TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 362

RAYMOND JEREAN KOLLER AND
MARTIN SILVERBROOK, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1958
CERTIORARI GRANTED NOVEMBER 17, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 12371, 12372

UNITED STATES OF AMERICA,

vs.

RAYMOND JEREAN KOLLER, Appellant in Appeal No. 12371,

and

MARTIN SILVERBROOK, Appellant in Appeal No. 12372.

Appeal from the Judgments of the District Court of the United States for the Eastern District of Pennsylvania (Civil Action No. 18994).

Appendix for Appellants

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

1955		
May	12.	Complaint filed.
May	12.	Summons exit.
Sep.	30.	Appearance of Davis S. Malis, Esq., for Martin Silverbrook, filed.
Oct.	3.	Motion of Morris Shneer for more definite statement filed.
Oct.	3.	Motion of Howard Albert Borden for more definite statement filed.
Oct.	15.	Motion of Stanley Bear for more definite statement filed.

Oct. 15. Motion of Joseph Henry Greenstone for more definite statement filed.

Oct. 15. Appearance of Bernard L. Lemisch Esq., for Joseph Henry Greenstone filed.

Oct. 15. Appearance of Lemisch & Ginsburg, Esq., for Stanley Bear filed.

Oct. 17. Appearance of Samuel B. Brodsky, Esq. for Edward Doman and Alexander Doman filed.

Oct. 17. Appearance of E. Bernard Schlegel, Esq. for Raymond Jean Koller, filed.

Oct. 17. Answer of Raymond Jerean Koller filed.

Oct. 19. Summons returned "on September 12, 1955 served Howard A. Borden and on September 23, 1955 served Morris Shneer and Martin Silverbrook and on September 27, 1955 served Stanley Bear, Raymond J. Koller, Alexander J. Doman, Edward Doman, and Morton Ziebman" and filed. As to Libers E. Shipton, Jack Leonard Erbaum, Joseph H. Greenstone and John D. Guille "not found".

Nov. 3. Stipulation of Counsel, W. Wilson White, and

[fol. 2] David S. Malis, Esq., acting for Martin Silverbrook only, that plaintiff have leave to file amended complaint within 20 days and Order approving same, filed.
Van.
11-3-55. Noted & notice mailed.

Dec. 8. Stipulation and Order re filing amended complaint, filed. 12-9-55 noted. W

Dec. 8. Amended Complaint filed.

Dec. 20. Motion by defendant Morris Shneer, for summary judgment filed.

Dec. 22. Amended Answer of Raymond Jerean Koller to amended complaint filed.

Dec. 28. Answer of Edward Doman and Alexander J. Doman to Amended Complaint filed.

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Jan. 9. Stipulation and Order approving stipulation extending time for filing answer of Martin Silverbrook etc. filed. Noted 1-10-56. G

Jan. 20. Answer of Joseph Henry Greenstone filed. Demand for jury trial filed.

Jan. 20. Answer of Stanley Bear and demand for jury trial filed.

Jan. 27. Motion of Martin Silverbrook to dismiss filed.

Mar. 13. Summons (2) on amended complaint exit as to John Daniel Guille and Jack Leonard Erlbaum.

Mar. 26. Argued sur motion of Morris Schneer for summary judgment CAV Kraft.

Mar. 27. Argued sur motion of Martin Silverbrook to Dismiss. CAV Kraft.

Apr. 16. Answer to Morton Zeidman to amended complaint filed.

Apr. 23. Summons as to Jack Leonard Erlbaum returned "on April 3, 1956 served" and filed. As to John Daniel Guille "not found".

May 4. Order to place case on trial list filed.

Jul. 16. [fol. 3] Opinion and Order of Court, Kraft J. denying motion of Martin Silverbrook to dismiss, and denying motion of Morris Shneer for summary judgment with leave to defendants to file answers within 20 days from this date, filed.
Noted & notice mailed 7-17-56. Kraft.

Jul. 21. Answer of Martin Silverbrook to Amended Complaint filed.

Aug. 3. Motion of Morris Shneer for reargument of Motion for summary judgment, filed.

Sept. 14. Reargument of Shneer's motion for summary Judgment. CAV Kraft.

Sept. 14. Motion of E. Bernard Schlegel, Esq., Attorney for Raymond Jerean Koller, for leave to withdraw appearance filed.

Sept. 25. Order of Court granting motion of E. Bernard Schlegel Esq., to withdraw his appearance filed. Noted & notice mailed 9-26-56. G.

Oct. 22. Memorandum and Order of Court denying motion of Morris Schneer for summary judgment etc. filed.
Noted 10-23-56. CWK.

Nov. 13. Stipulation and Order extending time for Morris Shneer to file answer to 11-30-56, filed. 11-14-56 Noted. Welsh.

Nov. 30. Answer of Morris Shneer to amended complaint filed.

1957

Apr. 3. Plaintiff's motion for summary judgment against Martin Silverbrook, filed.

Apr. 3. Plaintiff's motion for summary judgment against Raymond Joseph Koller, filed.

Apr. 16. Answer of Marin (sic) Silverbrook to plaintiff's motion for summary judgment, filed.

Apr. 18. Plaintiff's amended motion for summary judgment Martin Silverbrook filed.

Apr. 18. Plaintiff's amended motion for summary judgment against Raymond Joseph Koller filed.

[fol. 4] May 31. Appearance of Mathews E. Jaspan, Esq., for Howard Albert Borden filed.

May 31. Answer of Howard A. Borden to amended complaint filed.

Jun. 24. Argued sur Plff's motions and amended motions for summary judgment against Martin Silverbrook and Raymond J. Koller. CAV. Kraft.

Aug. 5. Memorandum, Kraft, J., finding that summary judgment may be entered for Plaintiff against Martin Silverbrook upon submission of an appropriate order, filed. Kraft.

Aug. 5. Memorandum, Kraft, J., finding that summary judgment may be entered for Plaintiff against

Raymond Joseph Koller upon submission of an appropriate order, filed. Kraft.

Aug. 7. Order entering Judgment in favor of Plaintiff against Raymond Joseph Koller, in $4,000. filed. 8-8-57. Noted & notice mailed. Kraft.

Aug. 7. Order of Court entering Judgment in favor of Plaintiff against Martin Silverbrook, in $2,000., filed. 8-8-57. Noted & notice mailed. Kraft.

Aug. 16. Notice of Appeal by Martin Silverbrook, defendant, filed. (8-19-57 copy to H. K. Wood.)

Aug. 16. Copy of Clerk's Notice to U. S. Court of Appeals filed.

Aug. 23. Appearance of Malis, Malis & Malis, Esqs., for Defendant Raymond Jerean Koller, filed.

Aug. 23. Notice of Appeal by Defendant Raymond Jerean Koller filed. (Copy to U. S. Attorney 8-24-57.)

Aug. 23. Certified copy of Clerk's notice to U. S. Court of Appeals filed.

Aug. 27. Bond for Costs on Appeal by Martin Silverbrook and Raymond J. Koller in the sum of $250. with Standard Accident Insurance Company as surety, filed.

Sep. 11. Record transmitted to U. S. Court of Appeals.

[fol. 5]

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT—Filed December 8, 1955

1. This is a civil action brought by the United States of America, plaintiff, of which this court has jurisdiction under the Provisions of Title 28 U. S. C. §1345; §26 of the Surplus Property Act of 1944 (50 U. S. C. App. §1635), and §209 of the Federal Property and Administrative Services Act of 1949 (40 U. S. C. §489). The said Surplus Property Act of 1944 was repealed and re-enacted with modifications as the Federal Property and Administrative Services Act of 1949 and both the said statutes are herein

sometimes referred to for convenience as "the Acts of Congress."

2. Under and by virtue of the Acts of Congress hereinabove referred to, the United States of America established policies, procedures and regulations for the disposition of Government-owned surplus property and prescribed the Federal agencies which were to have the power and authority to administer the program, and to promulgate implementing regulations, orders, directives and policies consistent with the provisions, policies and purposes of the said Acts of Congress.

3. Included in the Acts of Congress and the administrative regulations and policies hereinabove referred to were provisions, regulations and policies extending special and favored treatment to veterans of World War II. The said provisions, regulations and policies authorized, inter alia, the acquisition by such veterans of property, including the kind hereinafter mentioned in this complaint, deemed to be war surplus, to enable the veterans to establish themselves in business, agriculture, professional life, and for their own personal use and not for resale. Pursuant to the provisions of the said Acts of Congress, such veterans would be issued [fol. 6] priority certificates by the War Assets Administration which would entitle them to preference in the purchase of surplus property of the United States of America through the War Assets Administration.

4. Commencing on or about the month of July, 1945 and continuing through at least the month of March, 1948, the defendants used or engaged in and caused to use or engage in fraudulent tricks, schemes and devices and entered into agreements, combinations, or conspiracies which used or engaged in or caused to use or engage in fraudulent tricks, schemes and devices for the purpose of procuring or obtaining or aiding to procure and obtain certain property hereinafter referred to, from the United States of America in connection with the procurement, transfer, and disposition the same under the Acts of Congress and administrative regulations above referred to.

5. In accordance with the aforesaid conspiracies, in order to obtain surplus property of the United States, the defen-

dants, Edward Doman, Alexander Joseph Doman, Raymond Jerean Koller, Morton Zeidman, Howard Alber (sic) Borden, Jack Leonard Erlbaum, John Daniel Guille, Martin Silverbrook, Joseph Henry Greenstone, Stanley Bear and Libers Ersal Shipton, who were veterans, made and submitted at Philadelphia, Pennsylvania, to the Smaller War Plants Corporation or its successor, the War Assets Administration, both agencies of the United States, applications containing false and fraudulent statements of material facts concerning the nature, type and/or value of the business or enterprise, or the proposed business or enterprise, of the veteran defendant, the business experience of the veteran defendant and the purpose of the veteran defendant in acquiring surplus property, i.e., not for resale. The dates and numbers of such applications, by whom made, and the surplus property applied for and acquired thereby [fol. 7] are set forth in detail in Exhibit "A" which is annexed hereto and made part of this complaint.

6. The defendant, Morris Shneer, used fraudulent tricks, schemes and devices in furtherance of said conspiracy to obtain surplus property as follows:

The defendant caused the veteran defendants to submit the aforesaid false and fraudulent applications to the Smaller War Plants Corporation or the War Assets Administration for the purpose of acquiring surplus property.

The veteran defendants acquired certificates from the Smaller War Plants Corporation or the War Assets Administration and sold them to the defendant, Morris Shneer, for a consideration; Morris Shneer then used the certificates to acquire the surplus property from the aforesaid agencies of the United States.

The veteran defendants purchased from the Smaller War Plants Corporation or the War Assets Administration surplus property in accordance with the terms of said priority certificates previously obtained by them from the aforesaid agencies of the United States which certificates would then be turned over to Morris Shneer when in fact Morris Shneer selected the property and the purchases were made on behalf of Morris Shneer.

The names of the veteran defendants with whom the defendant engaged in such fraudulent tricks, schemes and devices, the transactions in which the defendant, Morris Shneer, was engaged with such veteran defendants and the dates thereof, and the surplus property thereby acquired are set forth in detail in Exhibit "A" which is annexed hereto and made part of this complaint.

7. By reason of the aforesaid tricks, schemes and devices employed by the defendants in connection with the acquisition of the aforesaid property, the plaintiff suffered damages.

[fol. 8] Wherefore, plaintiff demands judgment against the said defendants, jointly and severally, for double damages pursuant to statute, plus the sum of Two Thousand ($2,000.00) Dollars for each fraudulent act committed by the defendants in violation of the said statute, together with costs of this suit.

/s/ W. Wilson White, United States Attorney.

/s/ Norman C. Henss, Assistant United States Attorney.

[fol. 9] EXHIBIT "A" TO AMENDED COMPLAINT

EXCERPT OF RELEVANT MATTER

"EXHIBIT A."

Veteran Defendant	RAYMOND JEREAN KOLLER	MARTIN SILVERBROOK
Approximate Date of Application	7-12-45 Additional application 6-3-46	3-15-46 Additional application 12-27-46 for allegedly lost certificate and other additions to applications
Application No.	V3 A 54	V-3A=13540
Property applied for	Auto Car-tractor Mack International and 28 or 30 ft. trailer, open top or closed 2-2½ ton 4x4 cargo trucks, 6 wheels, closed cab	1 truck K60 va, closed cab, 6x6, 2½ton 5 stake & platform bodies, 2½ ton and other additions to applications
[fol. 10] Property Acquired	Truck, ambulance, ½ ton Dodge 1941, Serial No. 8649657 ½ ton truck 1944 cargo, Serial No. 215838 1942 Chevrolet 4-door sedan, Serial No. 14VG-116520 and others	6 buses and 3 trucks
Transaction engaged in or property received by MORRIS SHNEER	Yes	Yes

[fol. 11]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF RAYMOND JEREAN KOLLER TO AMENDED COMPLAINT—Filed December 22, 1955

Comes now the Defendant, Raymond Jerean Koller, by his attorney, E. Bernard Schlegel, Esquire, and answers the Amended Complaint as follows:

1. Defendant generally denies the allegations contained in paragraphs 1 through 7 inclusive of the Amended Complaint.

Wherefore, Defendant, Raymond Jerean Koller prays that the Complaint be dismissed.

/s/ E. Bernard Schlegel, 2901 P. S. F. Building, 12 South 12th Street, Philadelphia 7, Pa.

IN UNITED STATES DISTRICT COURT

MOTION OF MARTIN SILVERBROOK, ONE OF THE DEFENDANTS, TO DISMISS—Filed January 27, 1956

And Now, to wit, this 26th day of January, 1956, one of the defendants, Martin Silverbrook, moves the Court to dismiss the action for the following reason, to wit:

The action is barred by the Statute of Limitations.

Robert H. Malis, Attorney for Martin Silverbrook, One of the Defendants.

[fol. 12]

IN UNITED STATES DISTRICT COURT

OPINION—Filed July 16, 1956

Kraft, J. July 16, 1956

This civil suit was instituted by the United States against twelve defendants under Section 26(b)(1) of the Surplus Property Act of 1944[1] to recover the sum of $2,000 and

[1] Act of October 3, 1944, Chap. 479, 58 Stat. 765, as amended, repealed and re-enacted as Act of June 30, 1949, Chap. 288, Title II, Section 209, 63 Stat. 392, 40 U. S. C. A. §489.

double damages for each of sundry fraudulent transactions alleged to have been engaged in by the defendants. One defendant, Martin Silverbrook, filed a motion to dismiss; another, Morris Shneer, filed a motion for summary judgment. Both motions assert that the suit is barred by the five year statute of limitations[2] applicable to suits for civil penalties.

The critical question is whether the recoveries sought are penalties or damages. Defendants' argument is strongly persuasive that the sum of $2,000 claimed for each violation, in addition to double damages, is a civil penalty rather than damages. However, in Rex Trailer Co. v. United States, 350 U. S. 148, the Supreme Court, though discussing the difference between civil remedies and criminal penalties, did sufficiently indicate that it construed the provisions of Section 26(b)(1) to authorize "the recovery of a lump sum in damages."

[fol. 13]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT—July 16, 1956

Now, July 16, 1956, it is ordered that:

(1) Martin Silverbrook's motion to dismiss is denied.

(2) Morris Shneer's motion for summary judgment is denied.

(3) Both defendants are granted leave to file responsive answers within twenty days from this date.

C. William Kraft, Jr., J.

---

[2] "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued * * * " 62 Stat. 974, 40 U. S. C. A. §2462.

In United States District Court

Answer of the Defendant, Martin Silverbrook, to the Amended Complaint—Filed July 21, 1956

The answer of the defendant, Martin Silverbrook to the amended complaint, is as follows, to wit:

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied. For further answer hereto the defendant, Martin Silverbrook incorporates by reference the averments set forth hereinafter in paragraph 5 hereof.

5. The defendant, Martin Silverbrook, denies the averments of this paragraph as applied to him and avers that he was engaged in the business of buying and selling used automobiles and trucks and other vehicles as a means of livelihood and that the purchases and application for prior-[fol. 14] ity made by him were properly made in accordance with his understanding of the rights afforded veterans to make purchases for furtherance of their own business activities. It is admitted that the defendant, Martin Silverbrook made application under dates of March 15, 1946 and December 27, 1946, as set forth in Exhibit "A" to the Complaint but it is averred that the defendant had legal right to make such applications under the law.

6. Not applicable to this defendant.

Second Defense.

Defendant, Martin Silverbrook, alleges that the specifications set forth in the plaintiff's complaint against him, the said defendant, Martin Silverbrook alone do not constitute a violation of the law as applied to him, the said Martin Silverbrook.

Third Defense.

Defendant, Martin Silverbrook, avers that the cause of action set forth in the complaint is barred by the Statute of Limitations.

Fourth Defense.

Defendant, Martin Silverbrook, avers that the Statute on which the government relies was intended to confer a benefit upon returning veterans and cannot be construed to authorize a suit of this nature against the class of persons intended to be benefited.

[fol. 15] Wherefore, the defendant, Martin Silverbrook, respectfully prays the action be dismissed against him.

/s/ David S. Malis, Malis, Malis & Malis, Esquires,
Attorneys for Martin Silverbrook.

In United States District Court

Plaintiff's Motion for Summary Judgment Against Martin Silverbrook—Filed April 3, 1957

Now comes the plaintiff, the United States of America, by its attorney, G. Clinton Fogwell, Jr., United States Attorney, and moves this Honorable Court for Summary Judgment in favor of the plaintiff and against the defendant Martin Silverbrook in the above-captioned cause.

In support of said Motion, the plaintiff refers to Indictment number 15993 (*United States of America* v. *Martin Silverbrook*) and judgment of conviction on all counts upon a plea of guilty thereon, the original of said Indictment and judgment of conviction being on record in this Court, and shows the Court that there is no genuine issue as to the material facts in the instant cause, since such facts have been conclusively settled and determined by the final judgment or decree of this Court in the aforesaid criminal action between the same parties.

By reason of the foregoing, the plaintiff submits that it is entitled, as a matter of law, to the above-requested relief, including judgment in favor of the plaintiff and against the defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15993 and a $2,000. forfeiture, as provided for in Revised Statutes 3490 and [fol. 16] 5438, Title 40 U. S. C. §489(1), for the unlawful

acts recited in the one count of said indictment, or a total of $2,000.00 in forfeitures.

/s/ G. Clinton Fogwell, Jr., United States Attorney.

/s/ Henry J. Morgan, Assistant United States Attorney.

In United States District Court

Plaintiff's Motion for Summary Judgment Against Raymond Joseph Koller—Filed April 3, 1957

Now comes the plaintiff, the United States of America, by its attorney, G. Clinton Fogwell, Jr., United States Attorney, and moves this Honorable Court for Summary Judgment in favor of the plaintiff and against the defendant Raymond Joseph Koller in the above-captioned cause.

In support of said Motion, the plaintiff refers to Indictment number 15988 and judgment of conviction on all counts upon a plea of guilty thereon, the original of said Indictment and judgment of conviction being on record in this Court, and shows the Court that there is no genuine issue as to the material facts in the instant cause, since such facts have been conclusively settled and determined by the final judgment or decree of this court in the above-mentioned criminal action between the same parties.

By reason of the foregoing, the plaintiff submits that it is entitled, as a matter of law, to the above-requested relief, including judgment in favor of the plaintiff and against the defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15988 and a $2,000. forfeiture, as provided for in Revised Statutes 3490 and [fol. 17] 5438, Title 40 U. S. C. §489(1), for each of the unlawful acts recited in each of the two counts of said indictment, or a total of $4,000.00 in forfeitures.

G. Clinton Fogwell, Jr., United States Attorney.

Henry J. Morgan, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

ANSWER OF MARTIN SILVERBROOK TO MOTION FOR SUMMARY JUDGMENT—Filed April 16, 1957

And Now, to wit, comes the defendant, Martin Silverbrook, by his attorney Robert H. Malis, and files this answer to plaintiff's motion for summary judgment in the above captioned cause for the following reason:

The said civil action was commenced by the government on May 12, 1955. The events complained of took place March 15, 1946. The action is therefore barred by the Statute of Limitations—Section 1047 revised Statutes. 28 U. S. C. Section 791, 1940, 28 U. S. C. A., 2462 limiting the right to institute such actions to a period of five years.

/s/ Robert H. Malis, of Malis, Malis & Malis, Attorneys for Defendant, Martin Silverbrook.

[fol. 18]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT AGAINST MARTIN SILVERBROOK—Filed April 18, 1957

Now comes the plaintiff, the United States of America, by its attorney, G. Clinton Fogwell, Jr., United States Attorney, and moves this Honorable Court for Summary Judgment in favor of the plaintiff and against the defendant Martin Silverbrook in the above-captioned cause.

In Support of said Motion, the plaintiff refers to Indictment number 15993 (*United States of America* v. *Martin Silverbrook*) and judgment of conviction on all counts upon a plea of guilty thereon, the original of said Indictment and judgment of conviction being on record in this Court, and shows the Court that there is no genuine issue as to the material facts in the instant cause, since such facts have been conclusively settled and determined by the final judgment or decree of this Court in the aforesaid criminal action between the same parties.

By reason of the foregoing, the plaintiff submits that it is entitled, as a matter of law, to the above-requested relief, including judgment in favor of the plaintiff and against the

defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15993 and $2,000.00 as provided for in Revised Statutes 3490 and 5438, Title 40 U. S. C. §489(1), for the unlawful acts recited in the one count of said indictment, or a total of $2,000.00

/s/ G. Clinton Fogwell, Jr., United States Attorney.

/s/ Henry J. Morgan, Assistant United States Attorney.

[fol. 19]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT AGAINST RAYMOND JOSEPH KOLLER—Filed April 18, 1957

Now comes the plaintiff, the United States of America, by its attorney, G. Clinton Fogwell, Jr., United States Attorney, and moves this Honorable Court for Summary Judgment in favor of the plaintiff and against the defendant Raymond Joseph Koller in the above-captioned cause.

In support of said Motion, the plaintiff refers to Indictment number 15988 and judgment of conviction on all counts upon a plea of guilty thereon, the original of said Indictment and judgment of conviction being on record of this Court, and shows the Court that there is no genuine issue as to the material facts in the instant cause, since such facts have been conclusively settled and determined by the final judgment or decree of this court in the above-mentioned criminal action between the same parties.

By reason of the foregoing, the plaintiff submits that it is entitled, as a matter of law, to the above-requested relief, including judgment in favor of the plaintiff and against the defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15988 and $2,000.00, as provided for in Revised Statutes 3490 and 5438, Title 40 U. S. C. §489(1), for each of the unlawful acts recited in each of the two counts of said indictment, or a total of $4,000.00.

G. Clinton Fogwell, Jr., United States Attorney.

Henry J. Morgan, Assistant United States Attorney.

[fol. 20]

IN UNITED STATES DISTRICT COURT

MEMORANDUM GRANTING AMENDED MOTION FOR SUMMARY JUDGMENT—August 5th, 1957.

The plaintiff's amended motion for summary judgment is resisted by defendant, Silverbrook, only on the ground that the plaintiff's action is barred by the statute of limitations. The same question was raised by this defendant's motion to dismiss which was decided, albeit reluctantly, against the defendant in an opinion filed July 16, 1956. Accordingly, summary judgment for the plaintiff will be entered in accordance with its amended motion upon submission by counsel of an appropriate order.

By the Court, /s/ C. William Kraft, Jr., J.

IN UNITED STATES DISTRICT COURT

JUDGMENT ORDER IN APPEAL No. 12371—August 7, 1957

And Now, August 7, 1957, plaintiff's Amended Motion for Summary Judgment having been granted, judgment is hereby entered in favor of the plaintiff and against the defendant, Raymond Joseph Koller, in the sum of $4,000.00.

By the Court: /s/ C. William Kraft, Jr., J.

[fol. 21]

IN UNITED STATES DISTRICT COURT

JUDGMENT ORDER IN APPEAL No. 12372—August 7, 1957

And Now, August 7, 1957, plaintiff's Amended Motion for Summary Judgment having been granted, judgment is hereby entered in favor of the plaintiff and against the defendant, Martin Silverbrook, in the sum of $2,000.00.

By the Court: /s/ C. William Kraft, Jr., J.

In United States District Court

Defendant's Notice of Appeal in Appeal No. 12371—Filed August 23, 1957

Notice is hereby given that Raymond Jerean Koller, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the final judgment entered in this action on August 7, 1957.

/s/ Robert H. Malis, for Malis, Malis & Malis, Attorneys for Appellant.

[fol. 22]

In United States District Court

Defendant's Notice of Appeal in Appeal No. 12372—Filed August 16, 1957

Notice is hereby given that Martin Silverbrook, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the final judgment entered in this action on August 7, 1957.

/s/ Robert H. Malis, for Malis, Malis & Malis, Attorneys for Appellant.

[fol. 23]

In the United States Court of Appeals
For the Third Circuit

No. 12,371

United States of America,

v.

Edward Doman, Alexander Joseph Doman, Raymond Jerean Koller, Morton Zeidman, Howard Albert Borden, Jack Leonard Erlbaum, John Daniel Guille, Martin Silverbrook, Joseph Henry Greenstone, Stanley Bear, Libers Ersal Shipton, Morris Shneer.

Raymond Jerean Koller, Appellant.

No. 12,372

UNITED STATES OF AMERICA,

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.

MARTIN SILVERBROOK, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 19, 1958

Before BIGGS, Chief Judge, and GOODRICH and MCLAUGHLIN, Circuit Judges.

[fol. 24] OPINION OF THE COURT—Filed June 17, 1958

By Biggs, Chief Judge.

The two appeals at bar, arise out of a single case in the court below, and may be appropriately disposed of in a single opinion. This civil suit was instituted against the defendants under Section 26(b) (1) of the Surplus Property Act of 1944[1] to recover the sum of $2,000 and double damages for each of several fraudulent transactions alleged to have been engaged in by the defendants.

The United States filed motions for summary judgment against each of the defendants. Set out in the motions, as their bases, were indictments handed down against Koller and Silverbrook and others, alleging violations of Title 18, USC, 1940 ed. §80 (Mar. 4, 1909) C. 321 §35, 35 Stat. 1095. The asserted violations were that Koller and Silverbrook and others had engaged in a fraud upon the United States by filing false applications for priority in the purchase of

[1] Act of October 3, 1944, ch. 479, 58 Stat. 765 as amended, repealed, and reenacted as of June 30, 1949, ch. 288, Title II, Section 209, 63 Stat. 392, 40 U.S.C. § 489

property of the United States and were the identical acts alleged in the complaint in the present civil action. Both Koller and Silverbrook had pleaded guilty to the indictments and had been fined. The court below in the instant case correctly found that the pleas of guilty entered by Koller and Silverbrook in the criminal case referred to conclusively established the issue of fraud against them in the case at bar. On August 7, 1957 the court below entered judgment against both Koller and Silverbrook and the appeals at bar followed.

The acts complained of were committed by Silverbrook on March 15, 1946 and by Koller on July 12, 1945 and June 3, 1946. The complaint in the instant case was filed on May 12, 1955, more than nine years after the completion of the acts complained of. While the general rule is that [fol. 25] the statute of limitations ordinarily does not run against the United States, United States v. Summerlin, 310 U.S. 414 (1940), where the action brought by the United States is for the enforcement of a civil fine, penalty, or forfeiture, the statute of limitations is five years.[2] The narrow issue, therefore, is whether Section 26(b)(1) of the Surplus Property Act, which requires a person committing the prohibited act to pay the United States the sum of two thousand dollars for each fraudulent act in addition to double the amount of any damages which the United States may have sustained by reason of Koller's and Silverbrook's activities provides a civil fine, a penalty, or a forfeiture, or merely compensatory damages.

The United States, relying upon the opinion of the Supreme Court in Rex Trailer Co. v. United States, 350 U.S. 148 (1956), argues that the Surplus Property Act does not impose a civil fine, a penalty or a forfeiture and therefore the statute of limitations set forth in Section 2462, 28 U.S.C., does not bar suit on the claims before this court. Koller and Silverbrook contend that Section 26(b)(1) does impose a civil penalty and since the decision of the

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[2] "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." 28 U.S.C. § 2462.

Supreme Court in Rex Trailer did not deal with the statute of limitations issue it affords no authority for the determination of the issue at bar. We cannot agree with defendants' contentions.

In Rex Trailer the Supreme Court had before it the issue of whether the Rex Trailer Company, which had pleaded nolle contendere to a charge of fraudulently purchasing motor vehicles under the Act, and had been fined in that criminal proceeding, was subjected to double jeopardy when sued by the United States in a civil action under Section 26(b)(1) to recover $2,000 for each prohibited act, the acts complained of being those set out in the indictment in the criminal case. The court held in substance that [fol. 26] the recovery sought under Section 26(b)(1) was civil in nature and did not put the Trailer Company in jeopardy in violation of the Fifth Amendment.

The principal question presented for decision in Rex Trailer v. United States was stated to be whether the provisions of Section 26(b)(1) are civil or criminal. While the issue in Rex Trailer was one of double jeopardy, the Court, 350 U.S. at p. 149, stated that certiorari was granted to resolve an asserted conflict between the decisions of the Courts of Appeals. In footnote 2 it stated, "In considering whether the statute of limitations contained in 28 U.S.C. §2462 applied to §26(b)(1) of the Suplus Property Act the Fifth Circuit held §26(b)(1) to be a civil remedy in United States v. Weaver, 207 F. 2d 796, 797, and the Sixth Circuit held it to be penal in United States v. Witherspoon, 211 F. 2d 858."

In holding that Section 26(b)(1) of the Surplus Property Act created a statutory right in the United States to recover liquidated damages which were thought by the Court to be reasonable, we believe that the Court intended to put at rest the "asserted" conflict between the circuits. See United States v. Hougham, 148 F. Supp. 715 (S.D. Cal. 1957); United States v. Schneider, 139 F. Supp. 826 (S.D. N.Y. 1956); dissenting opinion of Judge Madden in Erie Basin Metal Products, Inc. v. United States, 150 F. Supp. 561, 566-7. But see the majority opinion in Erie Metal Products v. United States, supra.

We are of the opinion that Section 26(b)(1) does not provide for a penalty but is remedial in nature. We are buttressed in this view by the opinion of the Supreme Court in United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). This case involved an action under the False Claims Act, 31 U.S.C.A. §231, which contained language similar to that in Section 26(b)(1) of the Surplus Property Act. It provides that a person who commits certain frauds upon the United States " . . . shall forfeit and pay to the United States the sum of $2,000, and in addition, double the amount [fol. 27] of damages which the United States may have sustained. . . . " The Court held that this provision for the recovery of $2,000 and double damages for each fraud was a compensatory civil remedy and therefore was remedial in nature. The Court stated, 317 U.S. at p. 551, "We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure the government would be made completely whole."

The opinion in Marcus v. Hess was handed down on January 18, 1943. The Surplus Property Act, which employed virtually identical language, was enacted on October 3, 1944. As Mr. Justice Clark stated in footnote 4 cited to the text at 350 U.S. at p. 152, of Rex Trailer, "Under these circumstances it would be very difficult to say that these words which provided a civil remedy in the False Claims Act were not intended to provide the same kind of remedy in the Surplus Property Act."

Moreover, it should be noted that Section 26(b) contains three subsections.[3] The latter two clearly provide

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[3] Section 26(b) of the Surplus Property Act, Title 40 U.S.C. § 489 provides as follows:

> "(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States, or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

for multiple damages in the form of or as liquidated damages. These two subsections provide without question [fol. 28] a remedy clearly compensatory in nature. Both the wording of Section 26(b) and the pertinent Committee Report, S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14, show that the United States was to have the option of selecting as its remedy any one of the three different measures of damages. It is a reasonable construction of the section that Congress intended all three subparagraphs of Section 26(b) to be in pari materia. We cannot hold that Congress intended that the first of the three subsections set up a penalty section and the other two provided merely for compensatory liquidated damages.

The fact that Section 26(b)(1) allows for the recovery of $2,000 in addition to the double damages does not make that section punitive. In Helvering v. Mitchell, 303 U.S. 391 (1938) a 50% assessment upon those who committed fraud under the Revenue Act of 1928 was not considered a penalty, but rather was held to be a civil administrative sanction of a remedial nature. See Scadron's Estate v. Commissioner, 212 F. 2d 188 (2 Cir. 1954), cert. den. 348 U.S. 832 (1954); Kirk v. Commissioner, 179 F. 2d 619 (1 Cir. 1950); Reimer's Estate v. Commissioner, 180 F. 2d 159 (6 Cir. 1950).

The nature of the recovery is not altered by the inability of the United States in the case at bar to show actual damage, since, as was held in Rex Trailer Co., the remedy provided by 26(b)(1) is comparable to a recovery under

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"(1) shall pay to the United States the sum of $2,000. for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

"(2) shall, if the United States shall so elect, pay to the United States, as *liquidated damages*, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

"(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as *liquidated damages* any consideration given to the United States or any Government agency for such property." (Emphasis added.)

a liquidated damage provision which fixes compensation for anticipated loss. That the United States had a legitimate proprietary interest in insuring the disposal of its surplus materials to veterans in accordance with the announced policy and objectives of the Surplus Property Act, and that it suffered compensable damage under the statute by defendants' manifest perversion of that policy are propositions which have been settled beyond the need for further review. Rex Trailer Co. v. United States, supra; United States v. Bound Brook Hospital, 251 F. 2d 12 (3 Cir. 1958); Daniel v. United States, 234 F. 2d 102 (5 Cir. 1956).

[fol. 29] We conclude that Section 26(b)(1) provides for compensatory damages, and that the statute of limitations, Section 2462, 28 U.S.C., did not bar this action in the court below. The judgment of the court below will be affirmed.

[fol. 30]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,371

UNITED STATES OF AMERICA,

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERT ERSAL SHIPTON, MORRIS SHNEER,
RAYMOND JEREAN KOLLER, Appellant.

On appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, Chief Judge, and Goodrich and McLaughlin, Circuit Judges.

JUDGMENT—June 17, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,372

UNITED STATES OF AMERICA,

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER,
MARTIN SILVERBROOK, Appellant.

On appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, Chief Judge, and Goodrich and McLaughlin, Circuit Judges.

JUDGMENT—June 17, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

[fol. 32] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 33]

SUPREME COURT OF THE UNITED STATES

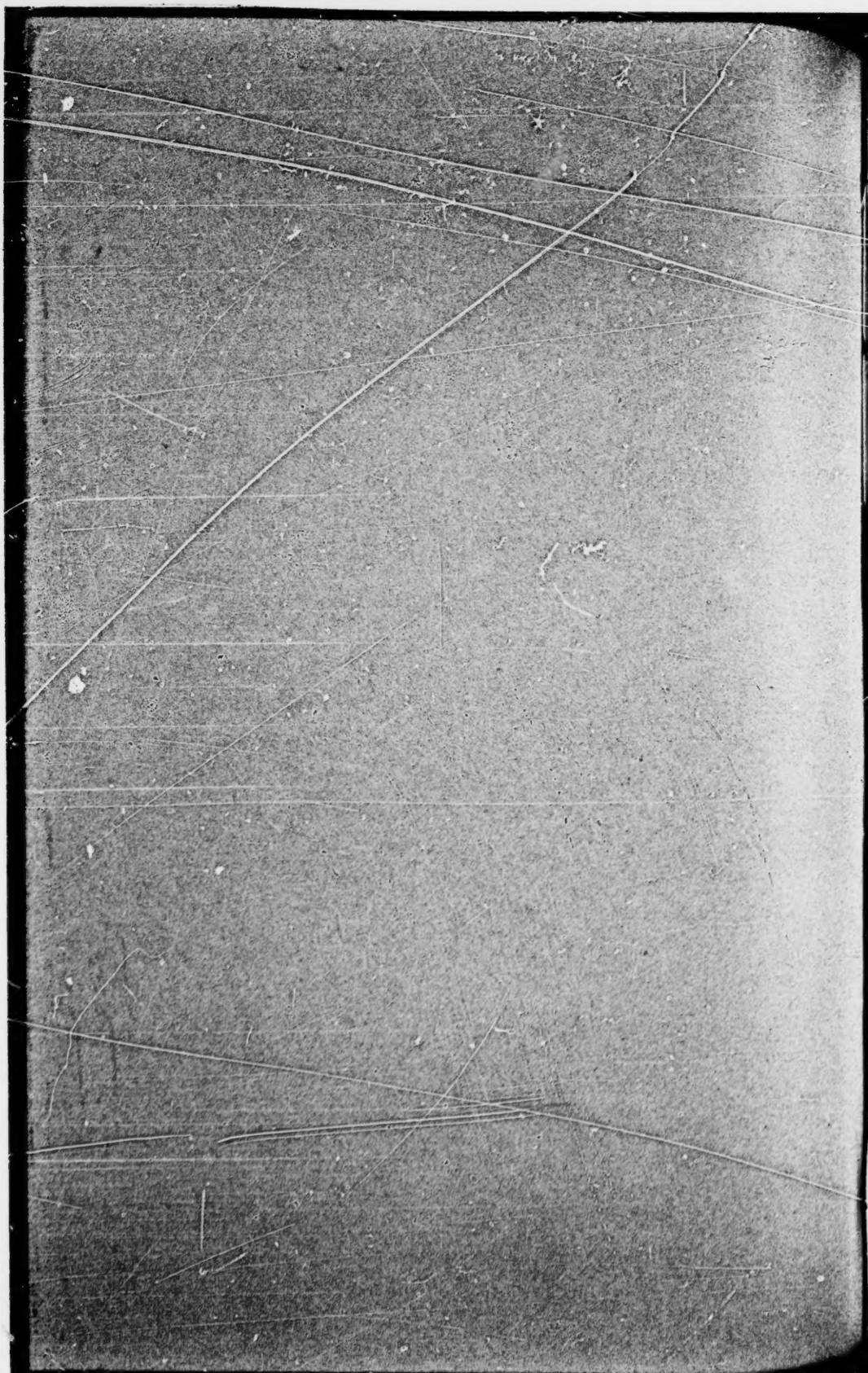
No. 362, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—November 17, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and case transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



FILED
SEP 13 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958. No. 362

RAYMOND JEREAN KOLLER and
MARTIN SILVERBROOK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1958. No.

RAYMOND JEREAN KOLLER and MARTIN SILVERBROOK,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on June 17, 1958.

OPINIONS BELOW.

The first opinion of the District Court is reported in 143 F. Supp. 154. It and the later memorandum of the District Judge appear in petitioners' appendix in the Court of Appeals at pages 12a and 20a. The opinion of the Court of Appeals is reported in 255 F. (2d) 865 (C. C. A. 3rd Cir., 1958). A copy of the opinion appears in the appendix attached to this petition.

JURISDICTION.

Judgment of the Court of Appeals was entered on June 17, 1958. Jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1), Act of June 25, 1948, c. 646, 62 Stat. 928.

QUESTIONS PRESENTED.

Does the Civil Statute of Limitations, 28 U. S. C. A., Sec. 2462, prohibiting the institution of suits by the United States to recover a penalty or forfeiture after five years from the date of the occurrences complained of, bar action under the Surplus Property Act of 1944, Sec. 26(b) (1), to recover Six Thousand ($6,000.00) Dollars for the filing of three false certificates by petitioners more than nine years before actions were started?

Does Sec. 26(b) (1) of the Surplus Property Act of 1944 (40 U. S. C. A. Sec. 489), which imposes upon a person committing a prohibited act the burden of paying to the United States the sum of Two Thousand ($2,000.00) Dollars for each such act and double the amount of any damage which

the United States may have sustained, impose a pecuniary civil fine, penalty or forfeiture upon such person?

STATUTES INVOLVED.

28 U. S. C. A. Sec. 2462, Act of June 25, 1948, c. 646, 62 Stat. 974:

> "Time for commencing proceedings
>
> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

40 U. S. C. A. Sec. 489, Act of June 30, 1949, c. 288, Title II, Sec. 209, 63 Stat. 392:

> . . . . . .
>
> (b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property under this chapter, chapter 11B of Title 5, chapter 4 of Title 41 and chapter 11 of Title 44 ——
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

STATEMENT OF THE CASE.

The United States began a civil suit in the District Court for the Eastern District of Pennsylvania against petitioners and others on the twelfth day of May, 1955. The complaint charged that petitioners took advantage of their status as veterans to buy three surplus motor vehicles from the Surplus Property Administrator for the benefit of a non-veteran, and in so doing filed three false certificates relating to their ownership of a business in which the vehicles were to be used (R. 6a, 7a).

The three acts complained of occurred on July 12, 1945, March 15, 1946 and June 3, 1946, approximately nine years before the filing of the complaint (R. 9a). The government demands the sum of $2,000.00 for the single fraudulent act alleged to have been committed by appellant Silverbrook and $4,000.00, in the aggregate, for the two alleged fraudulent certificates filed by appellant Koller. While a claim for double damages, in addition, is demanded in the complaint, no allegation of actual damage is presented, nor was any evidence of actual damage introduced in the proceedings below.

Both petitioners had been indicted for, and had entered pleas of guilty in 1950 to, the commission of the identical acts, and each had been sentenced to pay a fine at that time.

On April 3, 1957, the United States filed motions for summary judgments against petitioners, setting forth the convictions and demanding the entry of judgment in the sum of $2,000.00 against Silverbrook (R. 15a) and $4,000.00 against Koller (R. 16a). These motions were subsequently amended by the United States to eliminate therefrom the last two words in the motions, reading "in forfeitures" (R. 18a, 19a).

Petitioner Silverbrook had resisted the efforts of the United States by a motion to dismiss the complaint in January, 1956, raising the question of limitations (R. 11a). Honorable C. William Kraft, District Judge, denied this motion to dismiss (R. 12a) and petitioner answered responsively again raising limitations (R. 14a).

Upon the filing of the government's motions for summary judgment, petitioners again resisted in reliance upon the Statute of Limitations (R. 17a). The amended motions of the government were reluctantly granted on August 5, 1957, and judgments entered in favor of the United States against Silverbrook for $2,000.00 and against Koller for $4,000.00 (R. 20a, 21a).

Defendants promptly appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment of the District Court on July 17, 1958. It is from that affirmance that your petitioners now respectfully invoke the review of this Court.

REASONS FOR GRANTING THE WRIT.

The questions here involved have never been directly decided by the Supreme Court. There is a conflict in the several circuits and in the Court of Claims. The 5th Circuit

in *United States v. Weaver*, 207 F. (2d) 796, agrees with the Third Circuit in the matter; the 6th Circuit, in *United States v. Witherspoon*, 211 F. (2d) 858, and the Court of Claims in *Erie Basin Metal Products, Inc. v. United States*, 150 F. Supp. 561, both firmly hold otherwise.

The instant judgment destroys in its entirety the Act of Congress establishing limitations on civil actions (28 U. S. C. A. Sec. 2462).

The instant judgment destroys the plain meeting of our language and of the applicable law.

There are similar actions in the several judicial districts all over the United States, which are undecided by reason of the conflicts in the Circuit Courts and of the dictum in *Rex Trailer v. United States*, 350 U. S. 148, and clarification as to the Supreme Law of the land is desirable.

We respectfully submit that the question is one which it is in the public interest to have decided by the court of last resort.

ARGUMENT.

The narrow issue is whether Section 26(b) (3) of the Surplus Property Act, requiring a person committing a prohibited act to pay to the United States the sum of Two thousand ($2,000.00) dollars for each fraudulent act, in addition double the amount of any damages which the United States may have sustained, is a civil fine, a penalty or a forfeiture. If the provision of Section 26(b) (1) is such a fine or penalty, then the instant action is barred by the Statute of Limitations of five years provided in 28 U. S. C. A. 2462, prohibiting ". . . an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise," unless instituted within five years. Until the decision of the Supreme Court of the United States in *Rex Trailer Co. v. United States*, 350 U. S.

148 (1956), there was no doubt that the provisions of the Surplus Property Act (almost identical to those of the False Claims Act, 31 U. S. C. A. Sec. 231) constituted proceedings to collect a penalty and forfeiture of a pecuniary civil nature. *Huntington vs. Attrill*, 146 U. S. 657; *United States vs. Rohleder*, 157 Fed. (2d) 126; *United States vs. Witherspoon*, 211 Fed. (2d) 858.

In the decision of the Supreme Court in *Huntington v. Attrill, supra*, a penalty was defined as ". . . any extraordinary liability to which the law subjects the wrongdoer in favor of the person wronged, not limited to the damages suffered."

In the opinion of the Supreme Court in *Marcus v. Hess*, 317 U. S. 537, decided in 1943, the court referred throughout to the language of the False Claims Act as a penalty in express terms, as did Judge McLaughlin in dealing with a suit brought under the False Claims Act in *United States v. Rohleder, supra*. *Marcus v. Hess* merely affirmed the difference between *criminal* penalties and *civil* penalties, and held that the defense of double jeopardy would not lie to prevent the claim for recovery of the civil forfeiture.

The False Claims Act further contains its own limitations section requiring the commencement of suit within six years. The anomalous result of the holding in the instant case is that a suit brought under the False Claims Act, providing for the identical penalty as in the Surplus Property Act, is barred by limitations, whereas a suit under the Surplus Property Act for the same offense is not barred. After the decisions in *United States v. Weaver*, 207 Fed. (2d) 796 and in *United States v. Rex Trailer Co., supra*, the U. S. Court of Claims still reached the conclusion urged here in *Erie Basin Metal Products, Inc. v. United States*, 150 F. Supp. 561, after an exhaustive review of the problem by the entire court, and distinguished the situation at Bar from the situation which obtained in *Rex Trailer Co. v. United States*. Until the instant decision by the Court of Appeals for the Third Circuit, the expression of the Court

of Claims was the last expression on the subject, and, we respectfully submit, the proper one.

The language of the court in *Rex Trailer Co. vs. United States* has produced untold confusion among the Bench and the Bar alike by reason of the circumstances under which the opinion was handed down and by reason of the interchange of terms which occurred therein. Initially, the Supreme Court was faced with the problem of double jeopardy, exactly as in *Marcus v. Hess, supra*, and need not have decided anything other than that the provisions for penalties and forfeitures in the Surplus Property Act were *civil* in nature. Whether they were forfeitures or penalties or compensatory was not the issue, so long as they were not *criminal*. Unfortunately, Mr. Justice Clark, in the opinion in *Rex Trailer*, interchangeably employed the words "penal," "criminal," "compensatory" and "civil." His concluding statement, ". . . it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a *civil* remedy into a *criminal penalty*" (emphasis supplied), raises doubt as to the plain meaning of the expressions used.

We respectfully submit that the language of the Supreme Court, defining a penalty in *Huntington vs. Attrill, supra*, has been the law of the land since the days of the early common law. There is no impossibility in the law of the co-existence of civil penalties and criminal penalties. The inference was created by the Supreme Court in *Rex Trailer Co. v. United States, supra*, that a penalty is of necessity criminal, and that if an action be civil, then of necessity it is compensatory.

The holding of the United States Court of Appeals for the Third Circuit in this case, if it is the law of the land, has destroyed without a trace the entire force of the Act of Congress in establishing a period of limitations within which the United States must commence an action to recover a civil fine, penalty or forfeiture.

CONCLUSION.

For the foregoing reasons, we respectfully urge that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

ROBERT H. MALIS,
of MALIS, MALIS & MALIS,
Attorneys for Petitioners.

APPENDIX.

OPINION OF UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 12,371.

UNITED STATES OF AMERICA

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.

RAYMOND JEREAN KOLLER,

Appellant.

No. 12,372.

UNITED STATES OF AMERICA

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.

MARTIN SILVERBROOK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 19, 1958
Before: BIGGS, Chief Judge, and GOODRICH and McLAUGHLIN, Circuit Judges.

OPINION OF THE COURT.

(Filed June 17, 1958)

BY BIGGS, Chief Judge.

The two appeals at bar, arise out of a single case in the court below, and may be appropriately disposed of in a single opinion. This civil suit was instituted against the defendants under Section 26(b) (1) of the Surplus Property Act of 1944[1] to recover the sum of $2,000 and double damages for each of several fraudulent transactions alleged to have been engaged in by the defendants.

The United States filed motions for summary judgment against each of the defendants. Set out in the motions, as their bases, were indictments handed down against Koller and Silverbrook and others, alleging violations of Title 18, USC, 1940 ed. §80 (Mar. 4, 1909) C. 321 §35, 35 Stat. 1095. The asserted violations were that Koller and Silverbrook and others had engaged in a fraud upon the United States by filing false applications for priority in the purchase of property of the United States and were the identical acts alleged in the complaint in the present civil action. Both Koller and Silverbrook had pleaded guilty to the indictments and had been fined. The court below in the instant

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[1] Act of October 3, 1944, ch. 479, 58 Stat. 765 as amended, repealed, and reenacted as of June 30, 1949, ch. 288, Title II, Section 209, 63 Stat. 392, 40 U. S. C. §489.

case correctly found that the pleas of guilty entered by Koller and Silverbrook in the criminal case referred to conclusively established the issue of fraud against them in the case at bar. On August 7, 1957 the court below entered judgment against both Koller and Silverbrook and the appeals at bar followed.

The acts complained of were committed by Silverbrook on March 15, 1946 and by Koller on July 12, 1945 and June 3, 1946. The complaint in the instant case was filed on May 12, 1955, more than nine years after the completion of the acts complained of. While the general rule is that the statute of limitations ordinarily does not run against the United States, United States v. Summerlin, 310 U.S. 414 (1940), where the action brought by the United States is for the enforcement of a civil fine, penalty, or forfeiture, the statute of limitations is five years.[2] The narrow issue, therefore, is whether Section 26(b) (1) of the Surplus Property Act, which requires a person committing the prohibited act to pay the United States the sum of two thousand dollars for each fraudulent act in addition to double the amount of any damages which the United States may have sustained by reason of Koller's and Silverbrook's activities provides a civil fine, a penalty, or a forfeiture, or merely compensatory damages.

The United States, relying upon the opinion of the Supreme Court in Rex Trailer Co. v. United States, 350 U. S. 148 (1956), argues that the Surplus Property Act does not impose a civil fine, a penalty or a forfeiture and therefore the statute of limitations set forth in Section 2462, 28 U. S. C., does not bar suit on the claims before this court. Koller and Silverbrook contend that Section 26(b) (1) does impose a civil penalty and since the decision of the Supreme Court in Rex Trailer did not deal with the statute

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[2] "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." 28 U.S.C. §2462.

of limitations issue it affords no authority for the determination of the issue at bar. We cannot agree with defendants' contentions.

In Rex Trailer the Supreme Court had before it the issue of whether the Rex Trailer Company, which had pleaded *nolle contendere* to a charge of fraudulently purchasing motor vehicles under the Act, and had been fined in that criminal proceeding, was subjected to double jeopardy when sued by the United States in a civil action under Section 26(b) (1) to recover $2,000 for each prohibited act, the acts complained of being those set out in the indictment in the criminal case. The court held in substance that the recovery sought under Section 26(b) (1) was civil in nature and did not put the Trailer Company in jeopardy in violation of the Fifth Amendment.

The principal question presented for decision in Rex Trailer v. United States was stated to be whether the provisions of Section 26(b) (1) are civil or criminal. While the issue in Rex Trailer was one of double jeopardy, the Court, 350 U. S. at p. 149, stated that certiorari was granted to resolve an asserted conflict between the decisions of the Courts of Appeals. In footnote 2 it stated, "In considering whether the statute of limitations contained in 28 U. S. C. §2462 applied to §26(b) (1) of the Surplus Property Act the Fifth Circuit held §26(b) (1) to be a civil remedy in United States v. Weaver, 207 F. 2d 796, 797, and the Sixth Circuit held it to be penal in United States v. Witherspoon, 211 F. 2d 858."

In holding that Section 26(b) (1) of the Surplus Property Act created a statutory right in the United States to recover liquidated damages which were thought by the Court to be reasonable, we believe that the Court intended to put at rest the "asserted" conflict between the circuits. See United States v. Hougham, 148 F. Supp. 715 (S. D. Cal. 1957); United States v. Schneider, 139 F. Supp. 826 (S. D. N. Y. 1956); dissenting opinion of Judge Madden in Erie Basin Metal Products, Inc. v. United States, 150 F. Supp.

561, 566-7. But see the majority opinion in Erie Metal Products v. United States, *supra*.

We are of the opinion that Section 26(b) (1) does not provide for a penalty but is remedial in nature. We are buttressed in this view by the opinion of the Supreme Court in United States ex rel. Marcus v. Hess, 317 U. S. 537 (1943). This case involved an action under the False Claims Act, 31 U. S. C. A. §231, which contained language similar to that in Section 26(b) (1) of the Surplus Property Act. It provides that a person who commits certain frauds upon the United States ". . . shall forfeit and pay to the United States the sum of $2,000, and in addition, double the amount of damages which the United States may have sustained. . . ." The Court held that this provision for the recovery of $2,000 and double damages for each fraud was a compensatory civil remedy and therefore was remedial in nature. The Court stated, 317 U. S. at p. 551, "We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure the government would be made completely whole."

The opinion in Marcus v. Hess was handed down on January 18, 1943. The Surplus Property Act, which employed virtually identical language, was enacted on October 3, 1944. As Mr. Justice Clark stated in footnote 4 cited to the text at 350 U. S. at p. 152, of Rex Trailer, "Under these circumstances it would be very difficult to say that these words which provided a civil remedy in the False Claims Act were not intended to provide the same kind of remedy in the Surplus Property Act."

Moreover, it should be noted that Section 26(b) contains three subsections.[3] The latter two clearly provide for

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[3] Section 26(b) of the Surplus Property Act, Title 40 U. S. C. §489 provides as follows:

"(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device for the purpose of securing or obtaining, or aiding to secure or obtain,

multiple damages in the form of or as liquidated damages. These two subsections provide without question a remedy clearly compensatory in nature. Both the wording of Section 26(b) and the pertinent Committee Report, S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14, show that the United States was to have the option of selecting as its remedy any one of the three different measures of damages. It is a reasonable construction of the section that Congress intended all three subparagraphs of Section 26(b) to be *in pari materia*. We cannot hold that Congress intended that the first of the three subsections set up a penalty section and the other two provided merely for compensatory liquidated damages.

The fact that Section 26(b) (1) allows for the recovery of $2,000 in addition to the double damages does not make that section punitive. In Helvering v. Mitchell, 303 U. S. 391 (1938) a 50% assessment upon those who committed fraud under the Revenue Act of 1928 was not considered a penalty, but rather was held to be a civil administrative sanction of a remedial nature. See Scadron's Estate v. Commissioner, 212 F. 2d 188 (2 Cir. 1954), cert. den. 348 U. S. 832 (1954); Kirk v. Commissioner, 179 F. 2d 619 (1 Cir. 1950); Reimer's Estate v. Commissioner, 180 F. 2d 159 (6 Cir. 1950).

The nature of the recovery is not altered by the inability

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for any person any payment, property, or other benefits from the United States, or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

"(1) shall pay to the United States the sum of $2,000. for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

"(2) shall, if the United States shall so elect, pay to the United States, as **liquidated damages**, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

"(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as **liquidated damages** any consideration given to the United States or any Government agency for such property." (Emphasis added.)

of the United States in the case at bar to show actual damage, since, as was held in Rex Trailer Co., the remedy provided by 26(b) (1) is comparable to a recovery under a liquidated damage provision which fixes compensation for anticipated loss. That the United States had a legitimate proprietary interest in insuring the disposal of its surplus materials to veterans in accordance with the announced policy and objectives of the Surplus Property Act, and that it suffered compensable damage under the statute by defendants' manifest perversion of that policy are propositions which have been settled beyond the need for further review. Rex Trailer Co. v. United States, *supra*; United States v. Bound Brook Hospital, 251 F. 2d 12 (3 Cir. 1958). Daniel v. United States, 234 F. 2d 102 (5 Cir. 1956).

We conclude that Section 26(b) (1) provides for compensatory damages, and that the statute of limitations, Section 2462, 28 U. S. C., did not bar this action in the court below. The judgment of the court below will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

JUDGMENT OF UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 12,371.

UNITED STATES OF AMERICA

vs.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERT ERSAL SHIPTON, MORRIS SHNEER.

RAYMOND JEREAN KOLLER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, Chief Judge, and GOODRICH and McLAUGHLIN, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

June 17, 1958.

JUDGMENT OF UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT

No. 12,372

UNITED STATES OF AMERICA
vs.
EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.
MARTIN SILVERBROOK,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, Chief Judge, and GOODRICH and McLAUGHLIN, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

June 17, 1958.

FILED
OCT 14 1958
JAMES R. BROWNING, Clerk

No. 362

In the Supreme Court of the United States

OCTOBER TERM, 1958

RAYMOND JEREAN KOLLER AND MARTIN SILVERBROOK,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 362

RAYMOND JEREAN KOLLER AND MARTIN SILVERBROOK, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the district court is reported at 143 F. Supp. 154, and its memorandum opinion awarding summary judgment to the United States appears at page 20a of petitions' appendix in the court of appeals. The opinion of the court of appeals (Pet. App. 11-16) is reported at 255 F. 2d 865.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1958 (Pet. App. 11). The petition for a writ of certiorari was filed September 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a suit for damages under Section 26(b)(1) of the Surplus Property Act, which requires the payment of $2,000 for each violation of the Act plus double the amount of any damage which the United States may have sustained thereby, is an action for a "civil fine, penalty, or forfeiture," and thus subject to the five-year limitation period of 28 U.S.C. 2462.

STATUTES INVOLVED

Section 26(b) of the Surplus Property Act of 1944, 58 Stat. 780, 50 U.S.C. App. (1946 ed.) 1635(b), now codified as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 392, 40 U.S.C. (1952 ed.) 489(b), provides in pertinent part:

> (b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

Act of June 25, 1948, 62 Stat. 974, 28 U.S.C. 2462, provides as follows:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT

The United States instituted this civil suit under Section 26(b) (1) of the Surplus Property Act of 1944, *supra*, p. 2, to recover the sum of $2,000 and double damages for each of several fraudulent transactions engaged in by petitioners (Pet. App. 11). The district court held that petitioners' previous pleas of

guilty to indictments under 18 U.S.C. 80 for these identical acts conclusively established the issue of fraud against them in this civil suit and awarded summary judgment for the United States in the amount of $6,000, that is, $2,000 for each of three acts (Pet. App. 11-12). Petitioners thereupon appealed to the United States Court of Appeals for the Third Circuit, alleging that the Government's claims were barred by limitations (Pet. App. 12). They contended that Section 26(b)(1) of the Surplus Property Act, in providing for the recovery of $2,000 for each violation, imposed a civil penalty within the meaning of 28 U.S.C. 2462, *supra*, p. 3, and accordingly that this suit was subject to the five-year limitation which that statute sets on any suit for the enforcement of a "civil fine, penalty, or forfeiture." They pointed out that the complaint in this case was not filed until more than nine years after they had committed these fraudulent acts, and argued that this suit was therefore time-barred (Pet. App. 12).

The court of appeals rejected this contention, holding (Pet. App. 11-16) that "Section 26(b)(1) does not provide for a penalty but is remedial in nature" (Pet. App. 14). The court stated this question had been settled by the decision of the Supreme Court in *Rex Trailer Company* v. *United States*, 350 U.S. 148, holding that the $2,000 statutory sum provided in Section 26(b)(1) "is comparable to a recovery under a liquidated damage provision which fixes compensation for anticipated loss" (Pet. 16). The opinion also cited this Court's earlier decision in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, which held that a similar provision in the False Claims Act, 31 U.S.C.

231, likewise constituted a compensatory civil remedy (Pet. App. 14). On the basis of these decisions and its own examination of the statute, the court of appeals affirmed the judgment for the United States (Pet. App. 16).

ARGUMENT

The sole issue raised by petitioners is whether an action for damages under Section 26(b)(1) of the Surplus Property Act of 1944, *supra*, p. 2, is penal rather than remedial, and thus subject to the provisions of 28 U.S.C. 2462, *supra*, p. 3, which set a five-year limitation on suits to enforce civil penalties. We submit that this Court has definitely determined this question adversely to petitioners in *Rex Trailer Co.* v. *United States*, 350 U.S. 148, and accordingly that both courts below properly rejected petitioners' contentions.

In *Rex Trailer*, this Court held that the defendant, which had already been criminally convicted for the same fraudulent acts, was not subjected to double jeopardy by a subsequent action to recover the damages provided in Section 26(b)(1). The Court stated that these statutory damages are remedial only, intended like other liquidated damages provisions merely to make the Government whole where actual damages "* * * are uncertain in nature or amount or unmeasurable * * *." 350 U.S. at 153. The opinion pointed out that such "[l]iquidated-damage provisions, when reasonable, are not to be regarded as penalties" (350 U.S. at 151), and concluded that the measure of recovery fixed by this section—and "clearly intended as a civil remedy"—was not so unreasonable as to be transformed into a penalty. 350 U.S. at 154.

Despite the comprehensive language of the *Rex Trailer* decision, petitioners argue that the case decided

only that the sanction of Section 26(b)(1) was not a *criminal* penalty, but did not determine whether the statute provided for a *civil* penalty. This contention is plainly erroneous. For, although the narrow issue in *Rex Trailer* itself was the double jeopardy question, this Court expressly stated that, in reviewing the Seventh Circuit's decision in that case, it was also undertaking to resolve the conflict between the Fifth and Sixth Circuits on precisely the question petitioners raise here—whether the limitations provision of 28 U.S.C. 2462 governing suits for civil penalties applied to an action for damages under Section 26(b)(1) of the Surplus Property Act.[1] And both the language and the rationale of the *Rex Trailer* opinion leave no question as to the Court's conclusion on this question; the decision makes clear time and again that in no sense can the liquidated damages provision of Section 26(b)(1) be considered a penalty of any kind, either civil or criminal. Thus, the Court emphasized the remedial nature of Section 26(b)(1) by comparing the damages provided in that section with the remedies of 26(b)(2) and (3), which expressly provide for the recovery of "liquidated damages"; the opinion pointed out (350 U.S. at 151) that all three subsections were recognized by Congress as providing for "civil remedies," and concluded that all three

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[1] See 350 U.S. at 149, fn. 2, citing *United States* v. *Weaver*, 207 F.2d 796 (C.A. 5) and *United States* v. *Witherspoon*, 211 F.2d 858 (C.A. 6). Indeed, it was because of this conflict that the United States did not oppose the granting of certiorari in *Rex Trailer*. Although arguing that the Seventh Circuit had correctly decided the *Rex Trailer* case itself, the Government stated that it believed the conflict between the Fifth and Sixth Circuits on the applicability of 28 U.S.C. 2462 to suits under the Surplus Property Act required a "determination of the nature of the sanction provided by Section 26(b)(1) * * *." Memorandum for the United States, No. 46, October Term, 1955, p. 15.

are intended to perform the same purpose of indemnifying the Government for the injury actually done to it.[2] The Court further noted (350 U.S. at 152) that in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, it had held an essentially equivalent provision in the False Claims Act, 31 U.S.C. 231, to be "remedial and not penal, since it was unable to say that the provision for $2,000 plus double damages would 'do more than afford the government complete indemnity for the injuries done it.' 317 U.S. at 549."[3] And, finally, the Court expressly rejected the contention that 26(b)(1) provided for a penalty because it permitted recovery without proof of actual damage. The opinion pointed out that the Government was undoubtedly injured by the Rex Trailer Company's fraudulent acts, and that since these damages were difficult or impos-

[2] The court of appeals in the present case likewise pointed out with respect to the three subsections of Section 26(b) (Pet. App. 14-15):

> * * * The latter two [subsections] clearly provide for multiple damages in the form of or as liquidated damages. These two subsections provide without question a remedy clearly compensatory in nature. Both the wording of Section 26(b) and the pertinent Committee Report, S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14, show that the United States was to have the option of selecting as its remedy any one of the three different measures of damages. It is a reasonable construction of the section that Congress intended all three subparagraphs of Section 26(b) to be *in pari materia*. We cannot hold that Congress intended that the first of the three subsections set up a penalty section and the other two provided merely for compensatory liquidated damages.

[3] The *Rex Trailer* opinion also cites and relies upon *Helvering* v. *Mitchell*, 303 U.S. 391, holding that a 50 percent assessment upon those who committed fraud under the Revenue Act of 1928 was not a penalty, but rather a civil administrative sanction of a remedial nature. See also *Scadron's Estate* v. *Commissioner*, 212 F. 2d 188 (C.A. 2), certiorari denied, 348 U.S. 832; *Kirk* v. *Commissioner*, 179 F. 2d 619 (C.A. 1); *Reimer's Estate* v. *Commissioner*, 180 F. 2d 159 (C.A. 6).

sible to ascertain, they were properly compensated for by recovery of a lump sum in liquidated damages (350 U.S. at 153).

We submit that this Court has thus definitively determined the remedial nature of the damage provision of Section 26(b)(1) of the Surplus Property Act. Both courts below so held, and on that basis rejected petitioners' contention that the Government's suit under this section was barred by the statute of limitations applicable to suits for civil penalties. This determination was clearly correct, and warrants no further review here.

Although the decision of the court below is inconsistent with that of the Court of Claims in *Erie Basin Metal Products, Inc.* v. *United States*, 150 F. Supp. 561, we believe that in *Rex Trailer* this court clearly intended to resolve the conflict which then existed in a way contrary to that adopted by the Court of Claims and that that court has misinterpreted the decision of this Court. Since the ruling of the Court of Claims was interlocutory it has not been appropriate to seek review of it, but if that court continues to adhere to its conclusion, it may be necessary at some later time to ask this Court to rule on the issue again.[4]

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[4] Both courts below (Pet. App. 13-14), as well as other federal courts, have interpreted the decision in *Rex Trailer* as putting to rest the conflict on this question whether the damage provision of Section 26(b)(1) constituted a civil penalty within the meaning of 28 U.S.C. 2462. See *United States* v. *Hougham*, 148 F. Supp. 715 (S.D. Calif.); *United States* v. *Schneider*, 139 F. Supp. 826 (S.D. N.Y.); dissenting opinion of Judge Madden in *Erie Basin Metal Products, Inc.* v. *United States*, 150 F. Supp. 561, 566-7 (C. Cls.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1958.

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No. 362.

IN THE

Supreme Court of the United States

October Term, 1958.

RAYMOND JEREAN KOLLER and
MARTIN SILVERBROOK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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23 Am. Jur. §29 8

15 Am. Jur. §264 9

House Report 308, 80th Congress, 1st Session 6, 27

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1958.

No. 362.

RAYMOND JEREAN KOLLER and MARTIN SILVERBROOK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The first opinion of the District Court (R. 10, 11) is reported at 143 F. Supp. 154. The later memorandum of the District Judge (R. 17) is unreported. The opinion of the Court of Appeals (R. 18-24) is reported at 255 F. 2d 865.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 17, 1958. Jurisdiction of this Court was invoked under 28 U. S. C. 1254(1) on a Petition for Writ of Certiorari filed September 13, 1958, and granted November 17, 1958 (358 U. S. 892).

STATUTES INVOLVED.

Section 26(b) of the Surplus Property Act of 1944, 58 Stat. 780, 50 U. S. C. App. (1946 ed.) 1635(b), now codified as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 392, 40 U. S. C. (1952 ed.) 489(b), provides in pertinent part:

> "(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder ——
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> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or
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> (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the

United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be."

Act of June 25, 1948, 62 Stat. 974, 28 U. S. C. 2462, provides as follows:

"Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made therein."

QUESTIONS PRESENTED FOR REVIEW.

Does the Civil Statute of Limitations, 28 U. S. C. Sec. 2462, prohibiting the institution of suits by the United States to recover civil fines, penalties or forfeitures after five years from the date of the occurrences complained of, bar action under the Surplus Property Act of 1944, Sec. 26 (b) (1), to recover Six Thousand ($6,000.) Dollars for the filing of three false certificates by petitioners more than nine years before actions were started?

Do the provisions of Section 26 (b) (1) of the Surplus Property Act of 1944 (40 U. S. C. Sec. 489), imposing upon a person committing a prohibited act the burden of paying

to the United States the sum of Two Thousand ($2,000.) Dollars for each such act and double the amount of any damage which the United States may have sustained, constitute a civil fine, penalty or forfeiture?

STATEMENT OF THE CASE.

The United States instituted a civil suit under Section 26 (b) (1) of the Surplus Property Act of 1944 in the United States District Court for the Eastern District of Pennsylvania against petitioners and others on the twelfth day of May, 1955. The complaint, as amended, charged that petitioners took advantage of their status as veterans to buy three surplus motor vehicles from the War Assets Administration for the benefit of a non-veteran, and in so doing filed three false certificates relating to their ownership of a business in which the vehicles were to be used (R. 5, 9).

The three acts complained of occurred on July 12, 1945, March 15, 1946 and June 3, 1946, approximately nine years before the filing of the complaint (R. 9). The government demanded the sum of $2,000.00 for the single fraudulent act alleged to have been committed by petitioner Silverbrook, and $4,000.00, in the aggregate, for the two alleged false certificates filed by petitioner Koller (R. 8). While a claim for double damages is also included in the complaint, the record below is devoid of any allegation or proof of actual damages. Both petitioners had been indicted and had entered pleas of guilty in 1950 for the identical acts, and each had been fined at that time.

On April 3, 1957, the United States filed motions for summary judgments against petitioners, setting forth the convictions and demanding the entry of judgment in the sum of $2,000. "in forfeitures" against Silverbrook (R. 13) and $4,000. "in forfeitures" against Koller (R. 14). These mo-

tions were subsequently amended by the United States to eliminate therefrom the words "in forfeitures" (R. 15, 16).

Petitioner Silverbrook had previously resisted the efforts of the United States by a motion to dismiss the complaint on January 27, 1956, raising the question of limitations (R. 10). Honorable C. William Kraft, Jr., District Judge, denied this motion to dismiss (R. 10) and petitioner answered responsively again raising limitations (R. 12).

Upon the filing of the government's motions for summary judgment, petitioners again resisted in reliance upon the Statute of Limitations (R. 15). The amended motions of the government were "reluctantly" granted on August 5, 1957, and judgments entered in favor of the United States against Silverbrook for $2,000. and against Koller for $4,000. (R. 17).

Petitioners promptly appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment of the District Court on July 17, 1958 (R. 24, 25). Petitioners filed their petition for a writ of certiorari on September 13, 1958, which was granted on November 17, 1958.

SUMMARY OF ARGUMENT.

The holding of the Court below that suits under Section 26 (b) (1) of the Surplus Property Act to recover $2,000 for each of petitioners' three false certificates are not subject to the five year limitations provisions of Title 28 U. S. C. §2462 is founded upon a misapprehension and unjustified extension of the decision of the Supreme Court in *Rex Trailer Company v. United States*, 350 U. S. 148. That decision, as did *United States ex rel. Marcus v. Hess*, 317 U. S. 537, merely enunciated the philosophy that civil suits for forfeitures under the False Claims Act and the Surplus Property Act do not violate the prohibition of the 5th Amendment against double jeopardy where the defendants

had previously been indicted for the same offense. The Court below mistakenly construed *Rex Trailer* to deny the possibility of 26 (b) (1) constituting a *civil* penalty, subject to limitations. (Cf. *Erie Basin Metal Products v. United States*, 150 F. Supp. 561.)

The Congress understood and intended that Limitations would apply to 26 (b) (1) as it does to the identical suit under the False Claims Act. It specifically avoided referring to 26 (b) (1) as "liquidated damages" as was done in 26 (b) (2) and (3), and provided for an additional remedy in 26 (b) (1) of double the actual damages sustained. *Marcus v. Hess* had established the right of the government to collect the $2,000 forfeiture irrespective of any actual damages. (See also, *United States v. Rohleder* (C. A. 3), 157 F. 2d 126.)

House Report 308, 80th Congress, 1st Session, clearly manifested Congressional understanding that the $2,000 stipend was a forfeiture to be sued for in a civil action (28 U. S. C. 2461) and so interpreted the holding in *Marcus v. Hess*. This intent is in line with an unbroken history of almost one hundred years of judicial interpretation of suits under the False Claims Act, including the 1958 decisions in *Rainwater v. United States*, 356 U. S. 590, and *United States v. McNinch*, 356 U. S. 595.

Further, Congressional intent to bar suits for $2,000 and double damages after the passing of a reasonable period of time is demonstrated by the self-contained limitations section of the False Claims Act which has remained unrepealed since its enactment in 1863. Failure to include similar circumscription of the identical remedy under the Surplus Property Act does violence to that legislative plan.

Under the common law, recoveries unrelated to actual damages have always been a civil penalty. As well, double or treble damages received the same construction. *A fortiori*, the combination of the two remedies is manifestly a civil penalty.

ARGUMENT.

I. THE ISSUE.

The sole question presented for the consideration of the Supreme Court is whether a suit under Section 26 (b) (1) of the Surplus Property Act, demanding $2,000. and double the amount of any damages sustained by the government by reason of the presentation of an application containing a false statement by a veteran, is a suit for a civil fine, penalty or forfeiture within the meaning of the Statute of Limitations (28 U. S. C. Sec. 2462). If such a claim is a civil fine, penalty or forfeiture, then the action is barred by limitations, not having been brought within five (5) years from the date of the commission of the offense charged.[1] We submit that it is barred.

II. A "PENALTY" DEFINED.

A penalty has been defined as:

> "Any extraordinary liability to which the law subjects the wrongdoer in favor of the person wronged, not limited to the damages suffered."
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> *Schick v. U. S.*, 195 U. S. 65;
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> *Huntington v. Attrill*, 146 U. S. 657;
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> *Schaefer v. H. B. Green Transportation Lines*, 232 F. 2d 415, 418.

A penalty is distinguished from compensatory damages by its purpose and relation to actual loss as follows:

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[1] The Suspension of Limitations Act (18 U. S. C. 3281) has no effect on the issue since suit was instituted more than five years after December 31, 1949.

"By damages is understood the indemnity . . . which the law gives to the injured party for the breach of a contract or a duty. . . . Such damages are precisely commensurate with the injury received . . . A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by the law for its violation. It has no reference to the actual loss sustained . . ."

23 Am. Jur., Section 29, p. 625;
In Re Caponigra, 193 F. 291, 292.

Where the sum exacted bears no relation to the actual loss sustained, or is a multiple of that sum, it is a penalty regardless of the appellation applied to it.

Helwig v. United States, 188 U. S. 605, 613.

Thus, the sums recoverable under the Agricultural Adjustment Act,[2] the Sherman and Clayton Acts,[3] Securities Exchange Act,[4] the National Labor Relations Act,[5] the Emergency Price Control Act,[6] and many others are penalties.

Basically, from both a practical and an historical point of view, any statute authorizing recoveries measured by a multiple of the actual loss sustained is penal in character.[7]

"Penal" is much broader in its implications than "criminal", and a "penalty" may be either civil or criminal.[8]

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[2] **Western Fruit Growers v. U. S.**, 124 F. 2d 381

[3] **Harrison v. Paramount Pictures** (D. C. Pa. 1953), 115 F. S. 312, **affd.** 211 F. 2d 405, **cert. den.** 348 U. S. 828, 75 S. Ct. 45, 99 L. Ed. 653.

[4] **Wogahn v. Stevens**, 236 Wisconsin 122, 294 N. W. 503.

[5] **NLRB v. Continental Oil Co.**, 121 F. 2d 120, 125, **Porter v. Montgomery**, 163 F. 2d 211, 215.

[6] **Bowles v. Farmers National Bank**, 147 F. 2d 425, 428.

[7] **Republic Steel v. NLRB**, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. 6.

[8] E. g., "penal code," "penal institution," etc., but c. f. "penal sum" in mortgage obligations. See **Banana Distributors v. United Fruit Company** (S. D. N. Y.), 158 F. Supp. 160, and cases therein cited and discussed, **infra** p. 11.

By agreement the parties to a contract may stipulate, in lieu of the ordinary measure of damages, a specific sum in liquidation of the damages to which an aggrieved party shall be entitled in the event of default, but in these situations such amount must bear a reasonable relation to the value of the subject involved and be exclusive of all other measures." Whether the remedy constitutes liquidated damages is a matter of expressed intent and, since the device is in contravention of basic legal remedial precedents, is subject to careful scrutiny. In the several states, where the sum is excessive, or disproportionate to actual loss, it is deemed penal in spite of the designation of the sum as "liquidated damages" by the parties.

Whether or not *legislative* designation of a specified sum as "liquidated damages" in a statute is subject to judicial scrutiny need not be decided here, since the Congress saw fit *not* to apply that designation to the provisions of 26 (b) (1), as it did in 26 (b) (2) and 26 (b) (3).[10]

Finally, where the *purpose* of the liability imposed upon the defendant or wrongdoer is not to restore the *status quo*, but rather to effect legislative enforcement of the law by the imposition of a pecuniary deterrent to punish the offender, such provisions manifestly constitute forfeitures or penalties of a civil nature. *Schick v. United States*, 195 U. S. 65, 24 S. Ct. 826, 49 L. Ed. 99.

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[9] **Trans World Airlines, Inc. v. Travelers Indemnity Company, et al.** (C. A. 8), decided Jan. 5, 1959, Civil Action No. 16,041, as yet unreported officially, quoting with approval 15 **Am. Jur.**, Sec. 264, p. 269, as follows: " 'The effect of a clause for stipulated damages in a contract is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from breach . . . [T]he amount named forms . . . the measure of damages in case of a breach, and the recovery must be for that amount. No other or greater damages can be awarded, even though the actual loss may be greater or less.' "

[10] Congress specifically designated the provisions of 26(b) (2) and (3) as "liquidated damages," but did not apply the term to 26(b)(1). All rules governing construction of legislation demand judicial differentiation between the three sections rather than the unification urged by the government.

Considering the $2,000 stipend above, an amount imposed without respect to the amount of damages sustained, the recovery of such amount either inures to the Government in the form of liquidated damages or a civil penalty. This $2,000 stipend is a civil penalty for the following reasons:

As stated previously, Congress in enacting Section (b) (1) did not denominate the recovery of the $2,000 stipend as liquidated damages. If Congress intended Section (b) (1) to be an action for the recovery of liquidated damages, Congress would have denominated it a recovery for liquidated damages with the same specificity as it did in Section (b) (2) and (b) (3).

The recovery of the $2,000 stipend does not bar the Government from recovering actual damages in the same action, for the same alleged wrong, but, in fact, Section (b) (1) allows the Government to recover double the damages actually sustained by it. It is a basic tenet of Anglo-American jurisprudence, which needs no citation, that the courts will not condone or enforce multiple recoveries for the same alleged wrong; therefore, if the Government recovers this $2,000 as liquidated damages, then it would be automatically and forever barred and estopped from recovering actual damages for the same alleged wrong. *Trans World Airlines, Inc. v. The Travelers Indemnity Company* (*supra*, n. 9). To contend that the $2,000 stipend allowed by Section (b) (1) of the Surplus Property Act constitutes liquidated damages, when actual damages are neither liquidated nor dissolved, usurps this axiom and defies common sense, common law and the adjudged cases.

Before stipulated sums will be upheld by a court as liquidated damages, the relation to actual damages must be reasonable and not oppressive. The $2,000 stipend which Section 26 (b) (1) of the Act allows as a recovery and which the Government recovered herein is so greatly disproportionate in this action to the actual damages, inasmuch as no actual damages were sustained or proved, that it cannot be upheld as liquidated damages.

Furthermore, as the District Court ruled in the case at bar, the $2,000 stipend for each violation of the Act may be imposed upon a defendant irrespective of the fact that the Government sustained no damages whatsoever. However, under the common law, liquidated damages are not recoverable as such unless and until the plaintiff has suffered some types of damages, other than nominal damages. The damages suffered by a party in this instance may not be used as a measure of recovery, but the sufferance of these damages is a condition precedent to considering a pre-determined, set sum as liquidated damages, instead of a civil penalty. In the case at bar, the Government neither sustained nor proved any actual damages and the recovery which the Government effectuated herein was the recovery of a civil penalty.

Independent of the fact that the $2,000 stipend is a civil penalty, the imposition of double damages allowed by Section (b) (1) of itself constitutes a civil penalty. In order to recover the double damages which Section (b) (1) allows, the Government must allege and prove the actual damages which it sustained. Any recovery, doubling the actual damages sustained by the Government, does not compensate the Government for the damages which it may have sustained but inures to the Government in the form of a civil penalty.

The most cogent statement of this principle is contained in the case of *Banana Distributors v. United Fruit Company* (S. D. N. Y.), 158 F. Supp. 160, wherein the District Court in that instance reviewed and analyzed all the decisions on the issue whether the treble damage features of the antitrust laws were compensatory or civilly penal in nature and held that "the treble damage provisions of the antitrust laws are, both from a historical as well as from a practical viewpoint, penal in nature" (l. c. 167).

In elaborating further and quoting extensively from numerous cases, the Court stated:

"An analysis of the statutory provisions upon which the plaintiffs sue, clearly indicates that *the actual loss*

sustained by plaintiffs is only a base upon which the sanction of treble damages is superimposed. Thus, the fundamentally penal character of the right of action is evident" (l. c. 163). (Italics added.)

"In Fleitman v. Welsbach Street Lighting Co., 1916, 240 U. S. 27 at page 29, * * *, Holmes, J., described *a private Sherman Act case as involving 'a penalty of triple damages'* (l. c. 163). (Italics added.)

"In United States v. Standard Ultramarine and Color Company, D. C. S. D. N. Y. 1955, 137 F. Supp. 167, Judge Weinfeld wrote:

' * * * Another purpose in permitting an injured party to recover three-fold his actual damage was that *substantial verdicts against the wrongdoer would constitute punitive sanctions*—to act as a deterrent against a repetition of the offense and to serve as a warning of potential violators' (l. c. 163-164). (Italics added.)

" * * * in a case entitled American Banana Co. v. United Fruit Co., 153 F. 943, Judge Lacombe said:

' * * * it seems entirely clear that this is a penal action. It is instituted by a person who claims to have been injured by the unlawful acts of defendant *to recover, not only the damages which will compensate him for any loss he has sustained, but also a penalty of twice as much again, which represents no damages, but only a fine imposed for bad conduct*' (l. c. 164). (Italics added.)

" * * * in 1955, Lyons v. Westinghouse Electric Corporation, 222 F. 2d 184, certiorari denied 1955, 350 U. S. 825, * * *, a private triple damage action under the anti trust acts, Learned Hand, Circuit Judge, wrote:

' * * * The remedy provided is not solely civil; *two thirds of the recovery is not remedial and inevitably presupposes* a punitive purpose' (l. c. 164). (Italics added.)

" * * * impact of a suit under the federal antitrust acts is clearly upon the defendants. The defendants pay, and as to them a penalty is exacted" (l. c. 164).

"In Schiffman Bros., Inc. v. Texas Co., 7 Cir. 1952, 196 F. 2d 695, * * * , Judge Lindley stated:

'*Two-thirds of the judgment is the penalty imposed by Congress and automatically attaches to the damages found.* * * * And in H. J. Jaeger Research Laboratories v. Radio Corp., 3 Cir. 90 F. 2d 826, * * *, the third circuit said: "The Sherman Act created a new tort damage right for damages actually suffered, *but also imposed a statutory trebling penalty*" ' (l. c. 168). (Italics added.)

"In Sun Theatre Corp. v. R K O Radio Pictures, Inc., 7 Cir., 1954, 213 F. 2d 284, Judge Lindley discussed the question whether a plaintiff could avoid the effect of a penalty statute of limitations by suing only for actual damages and waiving the remaining two-thirds. On page 287 he said:

'The statute is explicit; the only remedy provided therein is "threefold the damages" sustained. *Giving to this language its plain meaning, we think the only permissible interpretation is that the remedy afforded is treble damages, penal in nature and susceptible therefore to all restrictions surrounding an action of such nature.* * * * "The verdict should represent actual damages sustained, and *two thirds of the judgment is a penalty which Congress has seen fit to impose* * * * "' " (l. c. 169). (Italics added.)

Furthermore, since each of the recoveries under Section (b) (1), namely, double the actual damages sustained and a $2,000 arbitrary stipend unrelated to the amount of actual damages sustained, taken separately, constitutes a civil penalty, the recovery of both of these unquestionably constitutes a civil penalty.

In addition, since the recovery is sought from both the veteran and the individual for whom he made the application, the Government conceivably can recover $4,000 and four times the damages provable for one false certificate.

To carry the thought one step further, if the defendant happened to be a partnership composed of two or more individuals, the recovery can continue to pyramid in multiples of $2,000 and double the damages sustained.

In *United States v. Witherspoon* (C. A. 6, 1954), 211 F. 2d 861, the court examined and commented on the definitions of damages and penalties as follows:

> " 'By damages is understood the indemnity, or composition in money, which the law gives to the injured party for the breach of a contract or a duty. In theory, such damages are precisely commensurate with the injury received, except in the case of exemplary damages or smart money, where some element of fraud, malice, gross negligence, or oppression enters into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery. 23 Am. Jur. 625. In American Fidelity & Casualty Co. v. G. A. Nichols Co., 10 Cir., 173 F. 2d 830, 833, it is stated: "The term 'penalty' is commonly used in the sense of an extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged as distinguished from compensation for the loss suffered by the injured person." *The exaction of the arbitrary sum of $2,000 for each offense of obtaining, by fraud, surplus property, without regard to its value, is a provision for a penalty. Its purpose is, obviously, to punish an offense against the public justice, in addition to double the amount of all damages suffered by the government.'*
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> "The District Court held that the complaint disclosed that the government's action was for a penalty, rather than for compensation for damages suffered as a result of appellee's alleged fraud, and with this conclusion we concur." (Italics added.)

While the government asserts no actual pecuniary loss in the instant case, its request for relief demands the sum of $2,000 and double the amount of actual loss for each false certificate. The basis of its claim is so clearly a penalty or forfeiture that the attorney for the government, in the original motion for summary judgment against Silverbrook, moved the court to enter judgment

> "in favor of the plaintiff and against the defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15993, and a $2,000. *forfeiture* . . . for the unlawful acts recited in the one count of said indictment, or a total of $2,000. in *forfeitures*." (Italics added.)

The same language was employed in the motion against Koller (R. 13, 14).

III. THE LAW BEFORE REX TRAILER.

Prior to the decision in *Rex Trailer Company v. United States*, 350 U. S. 148 (decided Jan. 9, 1956), there were few reported decisions on the narrow issue here presented, but with the exception of *United States v. Weaver* (C. A. 5), 207 F. 2d 796, they uniformly considered the $2,000 sum in 26 (b) (1) a civil penalty.[11]

In *United States v. Kolsky* (*supra*, n. 11), the District Judge abruptly dismissed the contention of the government that the action was not for a penalty or forfeiture in the following language (p. 360-361):

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[11] **U. S. v. Witherspoon** (C. A. 6, 1954), 211 F. 2d 858,
U. S. v. Comstock Extension Mining Co. (C. A. 9, 1954), 214 F. 2d 400;
U. S. v. Kolsky (E. D. Pa. 1955), 137 F. Supp. 359;
U. S. v. Covollo (E. D. Pa. 1955), 136 F. Supp 107;
U. S. v. Weaver (N. D. Ala., S. D., 1952), 107 F. Supp. 963, rev. 207 F. 2d 796.

> "The language of the Section, (Sec. 26 (b) (1) of the Surplus Property Act) . . . so clearly shows that a penalty was intended that a discussion thereon is deemed unnecessary."

Significantly, *Witherspoon* (*supra*, n. 11), decided after *Weaver*, ignored the prior decision of the sister Circuit and held the sanction a penalty.

While, by reason of its relatively short history, there have been few reported decisions on Limitations under the Surplus Property Act, since the enactment of the False Claims Act, 31 U. S. C. 231, in 1863, providing for the same statutory stipend as the Surplus Property Act in virtually identical language, there exists nearly one hundred years of judicial interpretation, with almost complete unanimity, construing the $2,000 clause as a penalty.[12]

As the Court of Appeals stated in the landmark case, *United States v. Shapleigh*, (*supra*, n. 12):

> ". . . The government might have proceeded by indictment to punish him for them under Section 5438. If it had done so, its case must have been proved beyond a reasonable doubt. It elected to proceed under Section 3490, by a civil suit, *to recover over $300,000. in penalties, to punish the defendant for the same crime. The penalties sought to be inflicted by the latter pro-*

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[12] **U. S. v. Duggan** (C. A. 8, 1954), 210 F. 2d 926;
U. S. v. Rohleder (C. A. 3, 1946), 157 F. 2d 126;
U. S. v. Dawes (C. A. 7, 1945), 151 F. 2d 639 (cert. den.);
U. S. v. Weekly Publications (C. A. 2, 1944), 144 F. 2d 186;
U. S. v. Baker-Lockwood (C. A. 8, 1943), 138 F. 2d 48 (rev. other grounds);
U. S. v. Bausch & Lomb Optical Co. (C. A. 2, 1942), 131 F. 2d 545 (aff'd and rehearing denied);
U. S. v. Fahey (C. A. Dist. of Col., 1941), 121 F. 2d 28 (cert. den.);
U. S. v. Mercur Corp. (C. A. 2, 1936), 83 F. 2d 178 (cert. den.);
U. S. v. Shapleigh (C. A. 8, 1893), 54 F. 126;
Pooler v. United States (C. A. 1, 1904), 127 F. 519, as well as District Court decisions too numerous to mention.

ceeding are far heavier than any that the court would probably have inflicted under the former." (Italics added.)

" . . . The action at bar is a civil suit in form; but . . . the government sought to punish this defendant for felonies by recovering the *penalty of double damages and $2,000. for each offense.*" (Italics added.)

This principle has been clearly enunciated by the Supreme Court in *Huntington v. Attrill, supra,* and in *Helwig v. United States* (1903), 188 U. S. 605, 47 L. Ed. 614, 23 S. Ct. 427, and, we submit, is still the basic law of our land today. It is largely by reason of the decision of this Court in *Rex Trailer v. United States* that a doubt has penetrated the solidarity of one hundred years of judicial certainty.

IV. THE IMPACT OF REX TRAILER.

In denying petitioner Silverbrook's motion to dismiss the complaint as barred by the Statute of Limitations (28 U. S. C. 2462), the district judge stated as follows (R. 10, 11):

"The critical question is whether the recovery sought are penalties or damages. Defendants' argument is strongly persuasive that the sum of Two Thousand Dollars ($2,000.) claimed for each violation, in addition to double damages, is a civil penalty rather than damages. However, in Rex Trailer Company v. U. S., 350 U. S. 148, the Supreme Court, discussing the difference between civil remedies and criminal remedies, did sufficiently indicate that it construed the provisions of Section 26 (b) (1) to authorize 'the recovery of a lump sum in damages.'"

Mr. Justice Clark stated the issue in *Rex Trailer* as follows:

"*Petitioner's sole contention is that 26 (b) (1) provides a criminal penalty and, having once been convicted and fined for the transactions in question, it cannot again be subject to punishment.* The only question for our decision, then, is whether 26 (b) (1) is *civil* or *penal*, for 'Congress may impose both a *criminal* and *civil sanction* in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense' * * * We conclude that the recovery here is *civil in nature.*" (Italics added.)

Mr. Justice Clark continued, referring to the case of *United States ex rel. Marcus v. Hess*, 317 U. S. 537, which

"involved a provision of the False Claims Act, R. S. Sec. 5438, 3490, 31 U. S. C. Section 231, essentially the equivalent of Sec. 26 (b) (i).

"The False Claims Act provides that the defrauder 'shall forfeit and pay to the United States the sum of $2,000. and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; *and such forfeiture and damages shall be sued for in the same suit.* * * *'

"The Surplus Property Act, which employed virtually identical language in Sec. 26 (b) (1), was enacted on October 3, 1944. Under these circumstances it would be difficult to say that these words which provided a *civil remedy* in the False Claims Act were not intended to provide the same kind of remedy in the Surplus Property Act."

In conclusion, Mr. Justice Clark stated:

"It cannot be said that the measure of recovery fixed by Congress in the Act is so excessive that it transformed what was clearly intended as a *civil remedy into a criminal penalty.*" (Italics added.)

The need for clarification of the doubts created by *Rex Trailer* is made abundantly clear from an examination of the quoted sections of the opinion. The issue involved was double jeopardy as defined in the 5th Amendment, i. e., was the proceeding *criminal or civil in nature*; not does 26 (b) (1) provide for *compensatory* or *punitive* damages. The respondent urges that Mr. Justice Clark's concluding statement has created the inference that, of necessity, there can be no co-existence in the law of *civil* penalties and *criminal* penalties, but, rather, that all penalties are criminal, and if the action be civil in nature and form, it is of necessity compensatory. In effect, maintains the government, the dictum in *Rex Trailer* denies the possibility of a *civil penalty*. This inference, we submit, is erroneous and we urge upon the Supreme Court that it reaffirm the basic principles relating to the recovery of civil penalties and forfeitures for violations of the laws of Congress.

Since the decision in *Rex Trailer*, the Court of Claims, in *Erie Basin Metal Products, Inc. v. United States*, 150 F. Supp. 561, after an exhaustive review of the entire situation created by *Rex Trailer*, held that the Statute of Limitations *was* applicable to such a suit. The court (referring to *Marcus v. Hess* and *Rex Trailer*) stated as follows:

> "In both of these cases the contractors asserted that, since they have been convicted criminally for the frauds perpetrated, they would be placed in double jeopardy if the government's claim for a money judgment against them should be sustained. That was the only issue before the Supreme Court and the only one it decided. It said that the claims under the False Claims Act, in one case, and under the Surplus Property Act in another, the Fraud section of which is substantially the same as the Contract Settlement Act, *were civil and not criminal actions and, hence, the plea of double jeopardy could not be sustained.* Section 2462 relates to an action for a '*civil* fine, penalty or forfeiture.' (Italics supplied.) (Sic) *The Supreme*

Court did not say that the Surplus Property Act and the False Claims Act did not impose civil penalties; it merely said they were not criminal penalties.

"We think that both acts impose penalties to be recovered by the government in a civil action. The purpose could not have been to save the government the necessity of proving actual damages for the fraud committed, as a liquidated damages provision, because the amount of the recovery was double the damages actually sustained. Damages had to be proven. *It was the purpose to make the consequences of fraud so great as to deter the commission of it.* If fraud was attempted, but was not accomplished, in which case there would be no actual damage, except the expenses of uncovering the fraud, the penalty was 25% of the amount sought to be wrongfully secured. If the fraud was successful, the amount wrongfully secured was to be refunded and, in addition, double the amount of the actual damage was recoverable, plus $2,000, for each fraudulent act.

"This was not a provision for liquidated damages damages had to be proven to recover under the double damages provision. The recovery of simple damages would not have been a penalty, but the recovery of double damages is * * *.

"Sedgwick, in his work on damages (Section 405), lays down this guide for distinguishing between a penalty and liquidated damages:

'Whenever the damages are evidently the subject of calculation and adjustment between the parties and a certain sum was agreed upon and intended as compensation, *and is in fact reasonable in amount*, it will be allowed by the court as liquidated damages. (Italics added.)' (Sic).

"Simple damages are compensatory: double damages, of necessity, are a penalty.

"Section 2462 of 28 U. S. C. provides that 'an action,

suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued * * *.

"*If this section does not apply to the character of action asserted by defendant in its counter-claim*, we can conceive of no action to which it could apply.

"*The applicability of Section 2462 was not before the Court; nor was the question of whether the provisions for double damages and Two thousand dollars ($2,000.00) for each fraudulent act, was a provision for a penalty or for liquidated damages.* The sole question was whether the provision was civil or criminal in nature. The court said, at the top of page 153, that 'the government's recovery here is liquidated-damage provisions which fix compensation for anticipated loss'; but it *did not say it was not a penalty as that word was used in Section 2462. Upon further consideration, we think it was.*" (Italics added.)

The government failed to appeal this decision, indicating considerable weakness in its position. It suffered the same defeat a short while later in *Goggin v. United States*, 152 F. Supp. 78 (Ct. Cl. 1957), in which Judge Madden, dissenting in *Erie Basin*, wrote the opinion for the court. Again, the government failed to appeal.

Subsequent to *Erie Basin* and *Goggin*, the 7th Circuit had 26 (b) (1) under consideration in *U. S. v. Rubin* (C. A. 7, 1957), 243 F. 2d 900. While the question of limitations was not the problem before the court, the plain language employed throughout strongly indicated the clear understanding that the $2,000. stipend was a penalty. The court began its opinion in the following language:

"In the civil complaint in this case the United States sought to recover from defendant the *civil penalties* fixed by Title 40, U. S. C. A., par. 489. . . .

"The government complains because . . . . the court

treated all such purchases upon each application as one transaction and assessed for all of them only one *penalty* of $2,000. This, it insists, was error because, on its theory of the case, each purchase constituted a separate act subjecting defendant to liability for the *penalty*. Hence, the government says there should have been judgment for a *penalty* for each of the different purchases, some fourteen in number, or the alternate remedy of double the value of the merchandise procured.

"We have observed the language of para. 26 (b) of the Surplus Property Act. *While there are no precedents, we think the situation is not lacking in analogy to others where penalties have been assessed.* * * * *United States ex rel. Marcus v. Hess*, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443; * * * *United States v. Rex Trailer Co.*, 7 Cir., 218 F. 2d 880, affirmed 350 U. S. 148, 76 S. Ct. 219, 100 L. Ed. 149. The reasoning in these and other decisions, dealing with other statutes, makes it clear, we think, *that it was the intent of Congress to require assessment against defendant of a penalty of $2,000 for each overt act performed by him in pursuance of the conspiracy with the veterans into which he had entered.*" (Italics added.)

On May 26, 1958, the Supreme Court of the United States had occasion to decide two companion cases involving the False Claims Act.[13] In *Rainwater et al. v. United States of America* (*supra*, n. 13), Mr. Justice Black began the opinion of the Court in the following language:

"This case involves two related suits by the United States to recover damages and *forfeitures* under the Civil provisions of the False Claims Act. * * * "

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[13] **Rainwater v. U. S.**, 356 U. S. 590, 2 L. Ed. 2d 996, 78 S. Ct. 946; **U. S. v. McNinch**, 356 U. S. 595, 2 L. Ed. 2d 1001, 78 S. Ct. 950.

He continued:

> "We are aware that the civil portion of the Act incorporates, as a test of liability, the provisions of the criminal section as they were set out in §5438 of the Revised Statutes of 1878,[8] and that according to familiar principles the scope of these provisions should be confined to their literal terms. Yet even penal provisions must be 'given their fair meaning in accord with the evident intent of Congress.'" United States v. Raynor, 302 U. S. 540, 552, 82 L. ed. 413, 415, 58 S. Ct. 353.

Footnote 8 referred to in the above quotation reads as follows:

> "8. *Originally Congress provided both criminal and civil sanctions in the same statute.* 12 Stat. 696. By the Revised Statutes of 1878 *the civil sanctions were codified as §3490*, while the criminal provisions were separately enacted as §5438. *Section 3490 permitted the Government to recover forfeitures and damages* for those acts prohibited by §5438, e. g., submission of false or fraudulent claims 'against the Government of the United States, or any department or officer thereof.' See note 1, supra. The civil provisions as enacted in §3490 have never been altered."
> (Italics added.)

Again, in the opinion in *United States v. McNinch* (*supra*, n. 13), Mr. Justice Black stated as follows:

> "This case was argued with Rainwater v. United States, 2 L. ed. 2d 996, also decided today. It involves three separate actions by the Government to recover damages and *forfeitures* under the False Claims Act.
> * * *
>
> "In Cato and Toepleman the District Court found the defendants had submitted false claims for crop support loans to the Commodity Credit Corporation,

> and entered judgment in favor of the Government for the *forfeitures* provided by the False Claims Act. * * * *"
>
> . . . . . "But it must be kept in mind, as we explained in Rainwater, that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions.
>
> * * * * * * * * *
>
> "The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury."

A careful consideration of the aforegoing language as well as that found in *Rubin* and *Erie Basin*, *supra*, renders inescapable the conclusion that Congress contemplated the precise situation encompassed in 26 (b) (1) when it enacted Sections 2461 and 2462 of Title 28.[14]

The government relies upon *Marcus v. Hess*[15] as a foundation for the position that the comparable provisions of the False Claims Act are purely compensatory and not in any sense a civil penalty or forfeiture. The issue in *Marcus*, as in *Rex Trailer*, was double jeopardy, not limitations, and

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[14] Cf. **U. S. v. Tieger** (C. A. 3, 1956), 234 F. 2d 589, **cert. den.**, 352 U. S. 941;
U. S. v. Cochran (C. A. 5, 1956), 235 F. 2d 131, **cert. den.**, 352 U. S. 941, 1 L. Ed. 2d 237, 77 S. Ct. 262;

[15] 317 U. S. 537, 87 L. Ed. 443, 63 S. Ct. 379 (1943).

the opinion reflects the conclusion that the subject provisions did not twice place the defendant in jeopardy for the same offense. However, Mr. Justice Black, writing for the Court clearly indicates that the $2,000 stipend, though not criminal, *is* a civil penalty or forfeiture.

At page 546, Justice Black quoted with approval from the Senate Sponsor of the Bill as follows:

> " 'Even the district attorney, who is required to be vigilant in the prosecution of such cases, may also be the informer, and entitle himself to one-half of the *forfeiture* under the qui tam clause and to one-half of the double damages which may be recovered against the persons committing the act.' " (Italics added.)

And, again, at page 552, Mr. Justice Black stated as follows:

> "Section 3490 requires that the $2,000 forfeit be paid for doing 'any' of the acts prohibited by 5438."

In his concurring opinion, Mr. Justice Frankfurter seems to have foretold the problem which was to arise, compounded by *Rex Trailer*, sixteen years later, by reason of the use of generic phraseology when he said (p. 554):

> "Such dialectical subtleties may serve well enough for purposes for explaining away uncritical language in earlier cases . . . but they are too subtle when the problem is one of safeguarding the humane interests for the protection of which the double jeopardy clause was written into the Fifth Amendment. . . .
>
> "Punitive ends may be pursued in civil proceedings. . . .
>
> "In my view the proper approach to the problem of double jeopardy in a situation like this, where Congress has imposed two sanctions for misconduct, however one may label them, and has provided for their enforcement in two separate proceedings, is . . . that where two such proceedings merely carry out the

remedy which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed in separate suits instead of in a single proceeding."

We urge that the individual rights of the citizens are equally affected by the application of the Statute of Limitations enacted by Congress to circumscribe the belated imposition of monumental assessments.

While certain language in the opinion in *Marcus* seems to lend support to the position of the government, great significance cannot attach to such language where the attention of the Court was directed solely to the issue of double jeopardy. No question of limitations was before the Court, since the False Claims Act contains its own six-year limitations period. Actually, the language of *Marcus*, as in *Rex Trailer*, not being directed to the issue here involved, was not couched in terms germane to our issue, and should be carefully restricted as authoritative to the narrow questions under review.[16] We feel strongly that the instant case is one of first impression in the Supreme Court and should be decided as such. We commend to this Court the opinion in *Erie Basin*, *supra*, where the Court, in an exhaustive analysis of *Rex Trailer*, concluded that the decision was not a suitable precedent for a Statute of Limitations case. We further urge that the failure of the government to appeal the decision in *Erie Basin* is strongly indicative of its lack of confidence in the argument which it now advances in the instant case.

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[16] Unfortunately, both petitioner and the government concurred in urging certiorari in **Rex Trailer** on the grounds of the conflict between **Witherspoon** and **Weaver** in a situation poorly suited to the resolution of the conflict. (Pet. Br. 6, Resp. Br. 14.) Other than the footnote reference to the "asserted conflict" Mr. Justice Clark made no further comment upon the limitations issue, and confined his attention to the double jeopardy problem.

V. LEGISLATIVE HISTORY AND CONGRESSIONAL INTENT.

In any case where there is raised a question of the purpose or effect of legislation under a given set of facts, the expressed intention of the Congress is frequently the best clue to the proper decision. In the instant case, the applicability of the Statute of Limitations in 28 U. S. C. Sec. 2462 is denied by the government because it claims that no civil fine, penalty or forfeiture is involved. As Mr. Justice Clark pointed out in *Rex Trailer*, there is no significant difference between the relevant provisions of the False Claims Act and the Surplus Property Act.[17] Since the False Claims Act has been considered drastically penal and to provide for civil penalties for almost one hundred years, the inference is inescapable that Section 26(b)(1) is likewise drastically penal and provides for civil penalties.

The Congress enacted a new section, 28 U. S. C. Section 2461, in 1948, which provides as follows:

> "Section 2461. Mode of recovery.
>
> (a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action."

House Report 308, 80th Congress, 1st Session, contains the following revealing expression of the legislative intent in enacting Section 2461:

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[17] **Marcus v. Hess.** " . . . involved a provision of the False Claims Act. R. S. Sec. 5438, 3490, 31 U. S. C. Section 231, essentially the equivalent of Sec. 26(b)(1)."

"Subsection (a) was drafted to clarify a serious ambiguity in existing law and is based upon rulings of the Supreme Court. *Numerous sections* in the United States code prescribe *civil fines, penalties and pecuniary forfeitures* for violation of certain sections without specifying the mode of recovery or enforcement thereof. See, for example, section 567 of title 12, U. S. C., 1940 ed., Banks and Banking; section 64 of title 14, U. S. C., 1940 ed.; Coast Guard, and Section 180 of title 25, U. S. C., 1940 ed., Indians. Compare Section 1 (21) of Title 49, U. S. C., 1940 ed., Transportation. (Italics added.)

"A civil fine, penalty, or pecuniary forfeiture is recoverable in a civil action. *United States ex rel. Marcus v. Hess et al.*, 1943, 63 S. T. 379, 317 U. S. 537, 87 L. Ed. 443, rehearing denied 63 S. Ct. 756, 318 U. S. 799, 87 L. Ed. 1163; *Hepner v. United States*, 1909, 29 S. Ct. 474, 213 U. S. 103, 53 L. Ed. 720, and cases cited therein. . . .

"If the statute contemplates a criminal fine, it can only be recovered in a criminal proceeding under the Federal Rules of Criminal Procedure after a conviction. The collection of civil fines and penalties, however, may not be had under the Federal Rules of Criminal Procedure, Rule 54(b)(5). . . ."

From this language it is apparent that the Congress considered the provisions of the False Claims Act under consideration in *Marcus v. Hess* to provide for "civil fines, penalties and forfeitures," as that language was codified in Sections 2461 and 2462. Without doubt, the Congress intended 2461 and 2462 to apply to statutes similar to that litigated in *Marcus v. Hess* and involving identical pecuniary provisions. In enacting Section 2461 and Section 2462 into Title 28 of the United States Code, the Congress incorporated into those sections the language employed by the

courts time and time again in referring to the financial aspects of 26(b)(1) and its counterparts in similar statutes.[18]

Regardless of the legalistic arguments advanced by the government to establish that the arbitrary sum of $2,000. is "compensatory," or "remedial," we insist that where the Congress uses the identical language employed by the courts to refer to that sum in a long history of decisions —uses the very same words in drafting Sections 2461 and 2462, that use of phraseology in legislation should be conclusive upon the Court. Where the Congress circumscribes the methods, procedures and time for collecting these sums, it matters little what labels or appellations are appended to them, so long as the clearly expressed ideas of Congress as to their collection are respected. If the courts have for years used the generic terms "forfeiture," and "penalty" to refer to the $2,000. figure employed in the False Claims Act and, more recently, in the Surplus Property Act, Contract Settlement Act and others, contemporaneous legislation by the Congress need not withstand argumentative analysis where it employs the identical terminology in its statutes. Further, under the view urged by the government, certain untenable anomalies result.

The False Claims Act has remained virtually unchanged during its entire history, containing its own six-year statute of limitations.[19] This is clearly indicative of Congressional intent that suits under this Act be laid to rest after such a period. If such a general statute remains unaltered for a century, does this not indicate that Congress did not desire the elimination of limitations from its provisions?

And, further, consider the inequities of a condition where liability exists unto eternity if one is pursued under the Surplus Property Act, long after the identical exposure is

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[18] E. g. In **U. S. v. Rohleder**, 157 F. 2d 126 (C. A. 3), the Court of Appeals referred to the $2,000. stipend in the False Claims Act as a "penalty" or "forfeiture" no less than eighteen times.

[19] 31 U. S. C. 235.

quieted under False Claims. To so hold is to render nugatory Section 2462, erasing it for all practical purposes from the rolls.

Of further significance is the fact that the Surplus Property Act, as originally enacted, contained a Suspension of Limitations Section,[20] which was re-enacted and preserved when the Act was recodified into Title 40.[21]

It seems inescapable that the enactment of Sections 2461 and 2462 relating to limitations, coupled with the suspension section enacted in the Surplus Property Act in 1944, is clearly indicative of Congressional intent and understanding that the Contract Settlement Act and the Surplus Property Act, both of which contain provisions identical to those in the False Claims Act under discussion in *Marcus*, are subject to the limitations of actions proscribed by the Congress for the recoveries of civil fines, penalties and forfeitures.[22]

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[20] Section 28 of the Surplus Property Act of 1944, repealed and re-enacted by the Act of June 25, 1948, C. 645; 18 U. S. C. 3287(2).

[21] 40 U. S. C. §489.

[22] "As was provided in the Contract Settlement Act of 1944, the Statute of Limitations, with respect to offenses against the laws of the United States arising with activities under this Act, was suspended until three years after termination of hostilities in the present war. This provision has been necessitated by the magnitude of the operations involved under this Act and the intensive preoccupation of both participants and witnesses with the war effort. It is clear that the bulk of the offenses cognizable under the statute will not be apprehended or investigated until the end of the war, and they will require considerable time until they advance to the stage of litigation." Senate Report No. 1057, 78th Congress, 2d Session.

VI. RECAPITULATION.

The conclusion to be reached, which we submit is the only conclusion which can properly flow from the plain language of the laws under consideration and from the judicial decisions of substance which have preceded and followed these laws for many years, is this:

The Surplus Property Act, like the False Claims Act, contains severe punitive provisions to deter false dealings with the government. These provisions, in addition to prosecution under the criminal section, authorize civil suits for highly punitive recoveries independently of any financial loss which may have been sustained by the government. The obvious purpose of the Congress, in enacting Section 26(b)(1) was to punish those citizens who falsely contract with or deceive the government. There is no doubt that the Congress itself also intended that Sections 2461 and 2462 be applicable to such suits, since it employed the same language used by the courts. Further, the Congress, acting in accordance with this understanding of its own laws, suspended the running of the Statute of Limitations in the Surplus Property Act and enacted a specific section to accomplish that purpose.

It is undeniable that the Congress, in Section 26(b) has provided the executive branch with extraordinary remedies, remedies for which no parallel exists in the private contracts of American citizens with each other.

When the Congress authorized such extraordinary remedies for the purpose of deterring the commission of undesirable practices, it circumscribed the power of the executive branch to enforce these remedies except within a specified period of time.

In this case nothing but the negligence of the government (or, perhaps, its earlier unwillingness and lack of desire) in proceeding timely against these veterans, has

created the problem now before the Supreme Court. These veterans were indicted in 1950. All of the facts were known then and there was no question of wartime pressures or concealment such as might have prevented the timely institution of the civil proceedings.

We submit that the respondent here has failed to pursue its extraordinary remedy within the allotted time, and for this reason we urge that the matter be forever laid to rest.

CONCLUSION.

For the foregoing reasons, the judgment entered below should be reversed.

Respectfully submitted,

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No. 362

In the Supreme Court of the United States

OCTOBER TERM, 1958

RAYMOND JEREAN KOLLER AND MARTIN SILVERBROOK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court denying petitioner Silverbrook's motion to dismiss (R. 10–11) is reported at 143 F. Supp. 154, *sub nom. United States* v. *Doman*. The memorandum opinion of the district court granting the Government's motion for summary judgment against petitioner Silverbrook (R. 17) is not reported. The short memorandum opinion of the district court with respect to its order (R. 17) granting the Government's motion for summary judgment against petitioner Koller was not reported and is not included in this record. The opinion of the court of appeals (R. 19–24) is reported at 255 F. 2d 865.

JURISDICTION

The judgments of the court of appeals were entered on June 17, 1958 (R. 24–25). The petition for a writ of certiorari was filed on September 13, 1958, and was granted on November 17, 1958 (R. 26). 358 U.S. 892. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the remedy provided by Section 26(b)(1) of the Surplus Property Act, permitting the Government to recover $2,000 for each violation of the Act plus double the amount of any damage sustained as a result of the violation, is an indemnification of the Government for its loss or a "civil fine, penalty, or forfeiture" to which the five-year limitation period of 28 U.S.C. 2462 is applicable.

STATUTES INVOLVED

Section 26(b) of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U.S.C. App. (1946 ed.) 1635(b), now codified as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 392, 40 U.S.C. 489(b), provides in pertinent part as follows:

> (b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connec-

tion with the procurement, transfer, or disposition of property hereunder—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

28 U.S.C. 2462 provides as follows:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT

This is a civil action instituted by the United States pursuant to Section 26(b)(1) of the Surplus Property

Act of 1944 (*supra,* pp. 2–3) to recover from the defendants double damages plus $2,000 for each fraudulent violation of the Act (R. 5–8).

The Government instituted this action against petitioners and ten other defendants on May 12, 1955 (R. 1). The amended complaint alleged that petitioners had made false and fraudulent statements of material facts in their applications for veterans' priority certificates (R. 7). The gravamen of the Government's allegations was that petitioners had served as front men to obtain for a non-veteran named Shneer surplus property to which Shneer was not otherwise entitled (R. 5–8). Specifically, the complaint charged that petitioners had stated in their applications for priority certificates their intention to purchase surplus property for their own use, while in fact they were acting at the instance and on behalf of Shneer (R. 7). Pursuant to this scheme, petitioners purchased various trucks, busses and cars which were selected by the non-veteran for his use. The fraudulent applications were filed by petitioners—two by Koller and one by Silverbrook—in 1945 and 1946 (R. 9). The complaint sought double damages plus $2,000 for each fraudulent act, together with costs (R. 8).

Petitioner Silverbrook filed a motion to dismiss on the ground that the action was barred by the statute of limitations provided in 28 U.S.C. 2462, *supra,* p. 3, applicable to "any civil fine, penalty, or forfeiture" (R. 10). The district court denied this motion on the ground that the recovery under Section 26(b)(1) was compensatory and that therefore 28 U.S.C. 2462 had no application to this suit.

The Government then filed motions for summary judgment against Koller and Silverbrook (R. 13–16). These motions were based on the fact that in 1950 petitioners had pleaded guilty to indictments charging them with violating 18 U.S.C. (1946 ed.) 80 (R. 15–16). The violations there charged were based on the identical transactions constituting the basis for recovery in the instant action (R. 15–16). Petitioners resisted this motion, relying only on the contention, previously raised and decided against Silverbrook, that these actions were barred by the statute of limitations in 28 U.S.C. 2462. The district court granted both of the Government's motions for summary judgment, awarding it $2,000 against petitioner Silverbrook for one violation of this Act and $4,000 against petitioner Koller for two violations of the Act (R. 17).

On appeal, the court below unanimously affirmed, holding that the recovery permitted by Section 26 (b)(1) is compensatory, not penal, and that therefore the five-year statute of limitations in 28 U.S.C. 2462 is inapplicable to this action (R. 19–24).

SUMMARY OF ARGUMENT

I

As both courts below held, the remedy provided by Section 26(b)(1) of the Surplus Property Act is compensatory and intended to insure the Government full restitution for its loss. Accordingly, the statute o flimitations contained in 28 U.S.C. 2462, *supra*, p. 3, dealing with civil fines, penalties and forfeitures, is not applicable to this suit under Section 26(b)(1).

This holding is compelled by this Court's opinion in *Rex Trailer Company* v. *United States*, 350 U.S. 148. That case also involved a suit under Section 26(b)(1) of the Surplus Property Act. The defendant contended that the action was barred by the double jeopardy clause of the Fifth Amendment because he had earlier been prosecuted criminally for the same transactions. The Court rejected this contention on the ground that the later action under Section 26(b)(1) was compensatory and therefore not barred by the double jeopardy clause. The Court stated, "The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss", 350 U.S. at 153.

Although the question in *Rex Trailer* as to the nature of the remedy under Section 26(b)(1) arose in the context of the double jeopardy clause, it is clear that the Court was aware of the potential application of its decision to the statute of limitations issue involved here. Indeed, the Court granted certiorari for the avowed purpose of resolving a conflict between circuits in cases involving the application of the statute of limitations in 28 U.S.C. 2462 to suits under Section 26(b)(1) of the Surplus Property Act (350 U.S. at 149). In one of these cases, the remedy provided by Section 26(b)(1) was held to be compensatory; in the other, penal. The present petitioners now take the position that the Court did not in *Rex Trailer* resolve the conflict which occasioned the grant of certiorari, despite the clear holding in that case that Section 26(b)(1) was intended to be, and is, compensatory.

II

The considerations which motivated the Court in *Rex Trailer,* we believe, will lead the Court to the same conclusion here. As a result of petitioners' fraudulent activities, the Government has suffered considerable damage, the extent of which it is difficult, if not impossible, to ascertain with any precision. Petitioners' fraud has precluded the Government from making bona fide sales to veterans; it has decreased the number of vehicles potentially available to Government agencies; and it has tended to promote undesirable speculation. Not only was the Government tricked into selling its vehicles to those with whom it specifically did not wish to deal, but also it was tricked into selling them at a price which had been established only for priority purposes. These injuries, while quite real, are impossible to reduce to an exact monetary amount. In these circumstances, liquidated damages are particularly appropriate. See, *e.g., Priebe & Sons v. United States,* 332 U.S. 407, 411–412.

An examination of the alternative measures of damages provided by Section 26(b) also indicates that Congress intended the remedy in Section 26(b)(1) as compensatory in the nature of liquidated damages. Subparagraphs 2 and 3, which contain alternative provisions for multiple damages, are specifically designated by the statute "as liquidated damages". Section 26(b) (2) and (3). As this Court stated in *Rex Trailer,* "the conclusion is inescapable that each [of these subsections] was of the same nature and designed to serve the same purpose", 350 U.S. at 151–152. As

subsections 2 and 3 are incontestably compensatory, it must follow that subsection 1 is also compensatory.

Additional internal evidence indicates that Congress did not consider the limitations provision of 28 U.S.C. 2462 applicable to an action under Section 26(b)(1). At the time the Surplus Property Act was enacted, Congress was aware of the necessity of suspending statutes of limitations during the war. Otherwise an applicable statute of limitations might run while the country was preoccupied with the war effort. See S. Rept. No. 1057, 78th Cong., 2d Sess., p. 14. To deal with this situation, Congress included Section 28 in the Surplus Property Act (58 Stat. 765, 781, 50 U.S.C. App. (1946 ed.) 1637) amending a provision of the Criminal Code (18 U.S.C. 590a) so that limitations on criminal violations of the Surplus Property Act would be suspended until three years after the termination of hostilities. By contrast, Congress provided no suspension of limitations on civil actions under Section 26, despite its awareness of the problem and of the necessity for suspending all applicable statutes of limitations. The implication to be drawn from this legislative history is that Congress did not consider any statute of limitations to be applicable to actions under Section 26(b).

The conclusion that the remedy in Section 26(b)(1) is compensatory is confirmed by a number of cases which have so construed similar statutes. An almost identical section in the False Claims Act (31 U.S.C. 231) has been held by this Court to be compensatory, and "to provide for restitution to the government of

money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 551–552. The statute of limitations involved in this action, 28 U.S.C. 2462, has also been held inapplicable to actions for double and treble damages under a variety of statutes. *E.g., Chattanooga Foundry* v. *Atlanta,* 203 U.S. 390, and *Keen* v. *Mid-Continent Petroleum Corp.,* 58 F. Supp. 915 (N.D. Iowa), affirmed, 157 F. 2d 310 (C.A. 8); see also *Overnight Motor Co.* v. *Missel,* 316 U.S. 572.

ARGUMENT

The sole issue presented by this case is whether the five-year statute of limitations in 28 U.S.C. 2462 (*supra,* p. 3), applicable to a "civil fine, penalty, or forfeiture," governs an action under Section 26 (b)(1) of the Surplus Property Act.[1] Whether the statute of limitations is applicable to an action under Section 26(b)(1) depends, in turn, on whether the remedy provided by that Section was intended by Congress to be, and is, compensatory. Both petitioners and the Government are in agreement that if the remedy provided by Section 26(b)(1) is compensatory, it is not a "civil fine, penalty, or forfeiture" to which alone the statute of limitations in 28 U.S.C. 2462 applies (Pet. Br. 7–9). In Point I, we show that this Court has already decided that the recovery

[1] There is no statute of limitations applicable generally to civil suits by the United States which do not involve a "civil fine, penalty, or forfeiture."

in Section 26(b)(1) is compensatory. In Point II, we examine many of the considerations which led the Court earlier to decide that Section 26(b)(1) is compensatory and demonstrate that these considerations again lead to the same conclusion.

I

THE COURT HAS ALREADY HELD IN *Rex Trailer Co. v. United States*, 350 U.S. 148, THAT THE RECOVERY PROVIDED IN SECTION 26(B)(1) OF THE SURPLUS PROPERTY ACT OF 1944 IS COMPENSATORY

The identical issue in dispute here was briefed, argued, and resolved by this Court in *Rex Trailer Co. v. United States*, 350 U.S. 148. In *Rex Trailer*, the Government sought damages under the same section of the Surplus Property Act [illegible] proceeding the Government had obtained a conviction against that defendant based on the transactions for which suit was later brought under Section 26(b)(1). The defendant contended that the action under Section 26(b)(1) placed it twice in jeopardy in violation of the Fifth Amendment.

In rejecting this contention, the Court held that the action under Section 26(b)(1) was not criminal because the remedy there provided was in the nature of liquidated damages intended completely to indemnify the United States for its loss. The Court stated its conclusion in clear and unequivocal language (350 U.S. at 151, 153):

> We conclude that the recovery here is civil in nature. The Government has the right to make contracts and hold and dispose of property, and, for the protection of its property

> rights, it may resort to the same remedies as a private person. *Cotton* v. *United States,* 11 How. 229. Liquidated damages are a well-known remedy, and in fact Congress has utilized this form of recovery in numerous situations. In all building contracts, for example, Congress has required the insertion of a liquidated-damage clause which "shall be conclusive and binding upon all parties" without proof of "actual or specific damages sustained * * *." 32 Stat. 326, 40 U.S.C. § 269. Liquidated-damage provisions, when reasonable, are not to be regarded as penalties, *United States* v. *United Engineering & Contracting Co.,* 234 U.S. 236, 241, and are therefore civil in nature.
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> * * * The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss. As this Court recognized in *Priebe & Sons* v. *United States,* 332 U.S. 407, 411–412, liquidated damages "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts * * *."

In reaching this conclusion, the Court relied heavily on its earlier decision in *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, which involved a provision of the False Claims Act, 31 U.S.C. 231, essentially the equivalent of Section 26(b)(1) of the Surplus Property Act.[2] In *Marcus* the defendant also contended that

[2] The False Claims Act provides that the defrauded "shall forfeit and pay to the United States the sum of $2,000, and, in

the double jeopardy clause of the Fifth Amendment forbade a suit under the False Claims Act after his prior conviction in a criminal action based on the same transactions. This contention was rejected. The holding of the case was succinctly stated by the Court in *Rex Trailer:* "[*Marcus*] *held* that the statute involved was *remedial* and *not penal*" (350 U.S. at 152. (Emphasis added.) By way of emphasis, the Court in *Rex Trailer* spoke of *Marcus* as "holding this provision to provide a *compensatory* civil remedy" (350 U.S. at 152, n. 4). (Emphasis added.) The Court concluded in *Rex Trailer* that the recovery under Section 26(b)(1) of the Surplus Property Act, as under the False Claims Act, was remedial and compensatory, and that accordingly the double jeopardy clause did not prevent the maintenance of the suit. It is therefore clear that the very question involved in the instant suit has already been decided by this Court in *Rex Trailer.*

Petitioners in the instant case attempt to distinguish *Rex Trailer* on the ground that it involved the application of the double jeopardy clause rather than the application of the statute of limitations in 28 U.S.C. 2462 (Pet. Br. 17–19). However, in determining the nature of the recovery in Section 26(b)(1), the Court in *Rex Trailer* was mindful of the reach of its decision to the statute of limitations situation. Indeed, the Court granted certiorari "to re-

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addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

solve an asserted conflict between the decisions of the Courts of Appeals" (350 U.S. at 149), a conflict not between cases involving double jeopardy, but a conflict involving the application of the statute of limitations in 28 U.S.C. 2462 to actions under Section 26(b)(1) of the Surplus Property Act. As the Court itself described the conflict (350 U.S. at 149):

> In considering whether the statute of limitations contained in 28 U.S.C. § 2462 applied to § 26(b)(1) of the Surplus Property Act, the Fifth Circuit held § 26(b)(1) to be a civil remedy in *United States* v. *Weaver*, 207 F. 2d 796, 797, and the Sixth Circuit held it to be penal in *United States* v. *Witherspoon*, 211 F. 2d 858.

Yet, petitioners now argue that this Court failed to resolve the very conflict which occasioned the grant of certiorari in *Rex Trailer*, a contention patently without merit.

Petitioners also suggest that the statements in *Rex Trailer* holding the recovery under Section 26(b)(1) compensatory and remedial rather than penal should now be disregarded because they are mere dicta, not required by the holding in the case (Pet. Br. 19, 26). However, as the quotations from *Rex Trailer* set out above (pp. 10–12) amply demonstrate, the holding that Section 26(b)(1) is compensatory and remedial is an integral part of the decision. The Court did not reason that the recovery under Section 26(b)(1) was civil, even if penal, and therefore not criminal. The Court reasoned that the recovery was compensatory and remedial, and therefore not criminal. Thus, the

Court's statements that the recovery under Section 26(b)(1) is compensatory and remedial are not mere gratuitous observations, but contain the basic rationale of the decision. The words of Justice Frankfurter dissenting in *Darr* v. *Burford*, 339 U.S. 200, 225–226, are apt:

> Opinions are required in our legal system in order that the reasoning which justifies a conclusion may be made manifest. The disclosure of the reasoning by which a conclusion is reached cannot remotely be deemed dictum. A decision implies the process of reasoning which requires it.

That the Court might possibly have arrived at its decision by another route and on another basis does not transform the rationale chosen by the Court into gratuitous dictum. See *Union Pacific Co.* v. *Mason City Co.*, 199 U.S. 160, 166; *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143. Cf. *United States* v. *Puff*, 211 F. 2d 171, 183–184 (C. A. 2), certiorari denied, 347 U.S. 963.

Finally, with the exception of the Court of Claims,[3] the courts considering the problem have concluded that *Rex Trailer* held that the statute of limitations

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[3] In *Erie Basin Metal Products* v. *United States*, 150 F. Supp. 561 (C. Cls.) and *Goggin* v. *United States*, 152 F. Supp. 78 (C. Cls.), the Court of Claims held that the statute of limitations in 28 U.S.C. 2462 was applicable to counterclaims filed by the Government under the Contract Settlement Act, 41 U.S.C. 119, the damage provision of which is substantially like that in Section 26(b)(1) of the Surplus Property Act. Neither of these decisions has yet become final because both involved counterclaims by the United States in suits in which the affirmative claim against the Government is still pending. It is for this reason that the Government has not petitioned for certiorari.

in 28 U.S.C. 2462 was inapplicable to a suit under Section 26(b)(1) of the Surplus Property Act. *E.g.*, *Daniel* v. *United States*, 234 F. 2d 102 (C.A. 5), certiorari denied, 352 U.S. 971; *United States* v. *Schneider*, 139 F. Supp. 826 (S.D. N.Y.); and *United States* v. *Hougham*, 148 F. Supp. 715 (S.D. Cal.) (on appeal to C.A. 9). See also *United States* v. *Barish*, 256 F. 2d 571 (C.A. 3).

In short, on the authority of *Rex Trailer*, petitioners' position here should be rejected.

II

A RE-EXAMINATION OF THE NATURE OF THE REMEDY PROVIDED BY SECTION 26(B)(1) WILL AGAIN DEMONSTRATE THAT IT IS, AND WAS INTENDED TO BE, COMPENSATORY AND NOT PENAL

As we have shown in the preceding point, *Rex Trailer* has conclusively decided the sole issue presented by the instant case. However, if the Court chooses to re-examine the rationale of *Rex Trailer*, we urge that the recovery provided by Section 26(b)(1) of the Surplus Property Act is, and was intended to be, compensatory.

1. A review of the statutory background is helpful. Section 26(b) of the Surplus Property Act of 1944 (*supra*, pp. 2–3), pursuant to which this action was brought, grants to the United States three alternative civil remedies against "Every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder * * *." The three alterna-

tive remedies provided by Section 26(b) are: (1) $2,000 for each fraudulent act plus twice the amount of any damages sustained plus the cost of suit; (2) twice the consideration which the purchaser agreed to pay for the property fraudulently obtained; or (3) the return of the property, allowing the Government to keep the full consideration paid by the fraudulent purchaser. See S. Rept. No. 1057, 78th Cong., 2d Sess., p. 14.

The objectives of the Surplus Property Act of 1944 (58 Stat. 765) were to facilitate and regulate the orderly disposal of surplus property (Section 2, 58 Stat. 766, 50 U.S.C. App. (1946 ed.) 1611) while giving effect to twenty enumerated purposes, including (d) the discouragement of monopolistic practices and the preservation of small business, (f) the giving of an opportunity to returning veterans to establish themselves in business, agriculture, or professional life, (h) the discouragement of disposal of surplus property to speculators, (q) the prevention of the making of unusual and excessive profits, and (t) the securing to the United States as nearly as possible the fair value of property disposed of under the Act, except when otherwise provided.

In order to carry out the statutory purpose of assisting veterans, Section 16 of the Act (58 Stat. 773, 50 U.S.C. App. (1940 ed., Supp. V) 1625) authorized the Surplus Property Board [4] to prescribe regulations

[4] The Surplus Property Board was abolished and its functions were transferred to the Surplus Property Administration and the Surplus Property Administrator, respectively, by the Act of September 18, 1945, 59 Stat. 533, 50 U.S.C. App. (1946 ed.) 1614a, 1614b. Executive Order No. 9689 of January 31, 1946 (11 F.R. 1265), transferred these functions first to the War

"to aid veterans to establish and maintain their own small business, professional, or agricultural enterprises, by affording veterans suitable preferences * * *." The actual operation of the statute, however, disclosed that this section was of little value to veterans since federal and state agencies enjoying priorities under Sections 12 and 13 higher than veterans (58 Stat. 770, 50 U.S.C. App. (1940 ed., Supp. V) 1621, 1622) absorbed virtually all the surplus property in which veterans were interested.[5] Congress, consequently, amended the Surplus Property Act in 1946 (60 Stat. 168, 50 U.S.C. (1946 ed.) 1625) by giving veterans a priority surpassed only by that of the Federal Government. In addition, the administrator[6] was authorized to—

> * * * set aside or otherwise * * * [make] available quantities and types of any surplus property, except real property, which he determines to be appropriate for *exclusive disposal* to veterans for their own personal use, and to enable them to establish and maintain their *own*

Assets Corporation and, effective March 25, 1946, to the War Assets Administration and the War Assets Administrator. Reorganization Plan No. 1 of 1947, Sec. 501, 61 Stat. 952, transferred these functions back to the Surplus Property Administration and the Surplus Property Administrator, changing their names, however, to the War Assets Administration and War Assets Administrator, respectively. The Federal Property and Administrative Services Act of 1949, Sec. 105 (63 Stat. 381, 5 U.S.C. 630c), finally placed these functions in the hands of the General Services Administration and the Administrator of General Services, respectively.

[5] Cf. S. Rept. No. 1142, 79th Cong., 2d Sess., and H. Rept. No. 1954, 79th Cong., 2d Sess.; 92 Cong. Rec. 4001.

[6] See fn. 4, p. 16, *supra*.

small business, professional, or agricultural enterprises. [Emphasis added.]

Property thus set aside for veterans enjoyed a superpriority surpassing even that of the United States.[7]

This preference was of great value to veterans, not only because it entitled them to acquire the property at an attractive price and on favorable credit terms,[8] but also because it enabled them to acquire those items which were in short supply. In 1946, the United States was still in the midst of reconversion, and surplus property sales were the only source from which many goods could be acquired.[9] As had been intended by Congress,[10] motor vehicles, the subject matter of the sales in this case, made up a large portion of the

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[7] S. Rept. No. 1142, 79th Cong., 2d Sess., p. 3, listed the priorities as follows:

1. Property set aside for veterans.
2. Federal Government.
3. Veterans generally.
4. Small business.
5. States and their political subdivisions and instrumentalities.

[8] 32 C.F.R. (1946 Supp.) 8302.8(d), 8302.11. The latter regulation provided:

"Disposal agencies shall fix the fair value at which property shall be acquired by priority claimants. *Such a fair value shall not be greater than the lowest price which is offered to any trade level at the time of acquisition* by the priority claimant, or where the fair value is fixed after examining competitive bids, it shall not be greater than the lowest acceptable bid." (Emphasis added.)

[9] See *e.g.*, H. Rept. No. 1954, 79th Cong., 2d Sess., p. 2; cf. Quarterly Progress Report to the Congress by the War Assets Administration, Second Quarter of 1946, p. 19.

[10] See H. Rept. No. 1954, 79th Cong., 2d Sess., p. 2; 92 Cong. Rec. 4001, 4002.

surplus property set aside for exclusive use for veterans."

2. The difficulties Congress faced in insuring that the Government would be fully compensated for its losses and the damage to its program resulting from fraudulent violations of the Surplus Property Act go a long way toward establishing the compensatory nature of the three alternative remedies provided by Section 26(b). Among the stated purposes of the Surplus Property Act were: to aid veterans in re-establishing themselves in civilian life; to provide for the disposal of billions of dollars of property without undue dislocation of the economy; and, at the same time, to preserve small business and discourage monopoly. What measure of damage would compensate the Government for impediments to these objectives? Only by providing the Government with alternative remedies which go beyond specifically provable damages could the Government be assured full compensation.

As this Court recognized in *Rex Trailer* (350 U.S. at 153–154):

> It is obvious that injury to the Government resulted from the Rex Trailer Company's fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation. The damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated dam-

[11] Schedule of Property to be set aside for veterans. Exhibit A following 32 C.F.R. (1946 Supp.) 8302.14.

> ages to provide a measure of recovery in such circumstances. On this record it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty.

Thus, the provision in Section 26(b)(1) allowing the Government to recover $2,000 for each violation of the Act plus double damages is not intended to punish the wrongdoers, but rather is a provision in the nature of liquidated damages attempting to estimate in advance what will constitute the Government's losses.

In order to help certified veterans in their readjustment to civilian life, the Government was willing to sell these vehicles to them at a price substantially lower than that which the vehicles would bring in the open market. See *supra*, p. 18, fn. 8. But the Government was *not* willing to sell these motor vehicles generally to those not entitled to priority, and even if it were, there is no indication that it would have been willing to sell the vehicles generally at the same price and under the same conditions. In these circumstances, petitioners' fraudulent misrepresentations had the effect not only of inducing the Government to sell the vehicles to persons with whom it had no intention of dealing, but also of selling the vehicles at lower than market prices to a person not entitled to priority. Plainly, this caused damage to the Government and its interests, and hindered the fulfillment of the high aims Congress set for the Surplus Property Act.

In addition, by fraudulently procuring the vehicles, petitioners reduced the number of surplus vehicles in the hands of the War Assets Administration. As a result, some Government agency which was entitled to priority may very well have been compelled to purchase vehicles at the higher market price. While Congress was agreeable to that result as far as veterans were concerned, it intended that Government agencies have top priority—after veterans—to guard against precisely such a result so far as other purchasers were concerned.[12] As stated in S. Rept. No. 1142, 79th Cong., 2d Sess., on the bill which set up the present priorities (at pp. 1–2):

> The committee amendment still continues the general first priority extended to Government agencies [in sales not exclusively for veterans]. It should be noted that the purpose of this priority is to save the Government money where one Government agency has surplus equipment which another Government agency requires for the discharge of its responsibilities. If the veterans' preference were advanced to outrank the Federal Government priority, the Federal Government might be compelled in many instances to purchase in the open market the same or similar goods as those which were disposed of as surplus by the War Assets Administration.

Petitioners' frauds had the effect of reducing the number of vehicles available to priority holders, including Government agencies, and might well have caused damage to the Government on this score.

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[12] For the order of priority, see fn. 7, *supra*, p. 18.

Finally, the Government is entitled not only to recover its losses from the sales themselves, but also to reimbursement of the costs incurred in connection with ferreting out and investigating the frauds. See, *e.g., Helvering* v. *Mitchell,* 303 U.S. 391. In that case, this Court held that the 50% additional tax imposed in tax fraud cases was remedial in nature and intended "to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud" (303 U.S. at 401). See also *Stockwell* v. *United States,* 13 Wall. 531, 547, 551; *Scadron's Estate* v. *Commissioner,* 212 F. 2d 188 (C.A. 2), certiorari denied, 348 U.S. 832.

Thus, although the Government had been damaged in the instant case, it was difficult, if not impossible, to reduce the injury to a monetary equivalent. This does not mean, however, that the exaction of the prescribed sum of $2,000 for each violation is a provision for a penalty. On the contrary, the fact that there is no exact or measurable monetary damage is the *raison d'etre* for the damage formulae of Section 26(b). As was observed by the Court in *Rex Trailer* (350 U.S. at 153):

> * * * The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss. As this Court recognized in *Priebe & Sons* v. *United States,* 332 U.S. 407, 411–412, liquidated damages "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable * * *."

And the Court concluded with respect to the substantially identical damage provision in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537:

> * * * We cannot say that the remedy now before us requiring payment of a lump sum [of $2,000] and double damages will do more than afford the government complete indemnity for the injuries done it. [317 U.S. at 549.]
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> * * * We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. * * * The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress. [317 U.S. at 551–552.]

3. That Congress intended the remedy in Section 26(b)(1) to be compensatory is confirmed by an examination of the alternative civil remedies in Section 26(b) (2) and (3), which provide that those who violate the Act:

> (2) shall, if the United States shall so elect, pay to the United States, *as liquidated damages*, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or
>
> (3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain *as liquidated damages* any consideration given to the United States or any

> Government agency for such property. [Emphasis added.]

It will be noted that these alternatives, although not dissimilar to Section 26(b)(1), and, like it, providing for multiple damages, are specifically designated "liquidated damages". It would be difficult to argue in face of this plain congressional designation that subsections (2) and (3) are anything but compensatory. Indeed, petitioners concede, as they must, that the remedies provided by subsections (2) and (3) were intended to be liquidated damages (Pet. Br. 10).

However, petitioners are then forced to take the position that in a single section, including three alternative civil remedies, Congress included two provisions intended to be compensatory and one intended to be punitive. But Congress would not have insinuated a punitive sanction as an alternative to two compensatory remedies in the same section. On the contrary, this juxtaposition makes it plain that Congress viewed all three subsections *in pari materia*. As stated in the Committee report, "the United States is given the option of electing among *three different measures of* damages * * *." S. Rept. No. 1057, 78th Cong., 2d Sess., pp. 13–14 [13] (Emphasis added.)

We can do no better than to quote the reasoning of this Court in *Rex Trailer* (350 U.S. at 151–152):

> These alternative remedies are set out in three consecutively numbered subsections of

[13] This Senate Report covers S. 2065. While the bill enacted was designated H.R. 5125, the Senate, after considering S. 2065, struck everything after the enacting clause of H.R. 5125 as it passed the House, and substituted therefore the text of the Senate bill, as amended. 90 Cong. Rec. 7330.

> § 26(b). All three were recognized as civil remedies by Congress before the bill was passed, and the conclusion is inescapable that each was of the same nature and designed to serve the same purpose.

See also *United States* v. *Rex Trailer Co.*, 218 F. 2d 880, 883 (C.A. 7); and the Court of Appeals opinion in the present case, 255 F. 2d 865, 868–869.

Accordingly, as subsections (2) and (3) were plainly intended to be compensatory, it must follow that the remedy provided by subsection (1) was intended to fall in the same category.

4. There is additional internal evidence in the Surplus Property Act that Congress considered 28 U.S.C. 2462 inapplicable to actions brought under Section 26(b)(1).

At the time the Surplus Property Act was enacted, the entire country was intensively preoccupied with the war effort. As a result of this preoccupation, there was a danger that any statute of limitations applicable to violations of the Surplus Property Act might run before a suit could be filed. Congress was acutely aware of this problem, as the committee report reflects:

> It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war and will then require considerable time before they advance to the stage of litigation. [S. Rept. No. 1057, 78th Cong., 2d Sess., p. 14.]

Therefore, Congress took great care to insure that violators of the Act did not escape punishment because of the country's preoccupation with the war.

At the time of the passage of the Act, a provision of the Criminal Code applicable to criminal prosecutions suspended the running of any statute of limitations against the United States until three years after the termination of hostilities in prosecutions involving "* * * defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * *", 58 Stat. 667.[14] Although this provision seemingly suspended the running of limitations against the United States in criminal prosecutions for violations of the Surplus Property Act, Congress nevertheless amended the provision by specifically adding violations of the Surplus

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[14] This suspension provision was originally enacted in 1942, Act of August 24, 1942, 56 Stat. 747, 18 U.S.C. (1940 ed., Supp III) 590a. Prior to the passage of the Surplus Property Act, this provision was amended on July 1, 1944 by Section 19 of the Contract Settlement Act, 58 Stat. 649, 667. At the time of the passage of the Surplus Property Act, Section 590a of Title 18 read as follows (58 Stat. 667):

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

Property Act to the list of prosecutions in which limitations were suspended by the statute. This amendment was made by Section 28 of the Surplus Property Act, 58 Stat. 765, 781, 50 U.S.C. App. (1946 ed.) 1637. Section 28, labeled "Amendment of section 590a of Title 18", reads as follows:

> The first section of the Act of August 24, 1942 (56 Stat. 747), as amended [Section 590a of Title 18], is amended to read as follows:
>
> "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

As indicated by the history we have just set forth, this Section of the Surplus Property Act changed existing law by adding Clause 3 to then 18 U.S.C. 590a. See note to 18 U.S.C. (1946 ed.) 590a.

This evidences the extreme care which Congress took to insure that statutes of limitations applicable to criminal prosecutions for violations of the Surplus Property Act would be suspended until three years after the termination of hostilities. Indeed, Congress went so far as to enact an amendment to existing law which, on its face, might have been thought to be unnecessary.

Yet, despite the obvious care that Congress took to insure the suspension of limitations in criminal prosecutions, it provided no suspension of limitations with respect to civil actions under Section 26(b) of the Act. The conclusion is compelling: Congress did not suspend limitations on actions under Section 26(b) because it did not consider that any statute of limitations was applicable to an action under that Section. For Congress was clearly aware of the necessity for suspending any *applicable* statute of limitations. If a wartime suspension of limitations on criminal prosecutions was "necessitated by the magnitude of the operations involved under this act, and the intensive preoccupation of both participants and witnesses with the war effort," [15] this was equally true of civil actions under Section 26(b). The failure of Congress to provide for a suspension of limitations on actions under Section 26(b) can mean only that it did not

[15] S. Rept. No. 1057, 78th Cong., 2d Sess., p. 14.

consider any statute of limitations applicable to actions brought under that Section.

5. The conclusion that Section 26(b)(1) is compensatory is further buttressed by the fact that Congress has used similar measures of damages in other statutes which this and other courts have held to be compensatory and not subject to the statute of limitations in 28 U.S.C. 2462.

As we have already noted, the substantially identical provision of the False Claims Act, 31 U.S.C. 231, has been held by this Court to be compensatory in *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537. See also *United States ex rel. Ostrager* v. *New Orleans Chapter, Associated General Contractors,* 317 U.S. 562, which involved the same issue as *Marcus* v. *Hess,* and was disposed of on the authority of that case.

A statute allowing the Government to recover an additional 50% addendum to the assessed tax in cases where the deficiency was the result of fraud has been held, not a penalty, but rather a remedial measure intended to indemnify the Government for its loss. *Helvering* v. *Mitchell,* 303 U.S. 391. See also *Scadron's Estate* v. *Commissioner,* 212 F. 2d 188 (C.A. 2), certiorari denied, 348 U.S. 832.

Contrary to petitioners' contention that double damages are perforce a penalty (Pet. Br. 20) and that the treble damage provisions of the anti-trust laws are penal (Pet. Br. 11–13), it is established beyond doubt that such actions are *not* penal within the meaning of 28 U.S.C. 2462. Thus, this Court has held that the five-year statute of limitations provided by Rev. Stat.

§ 1047 [16] (the forerunner of 28 U.S.C. 2462) was inapplicable to an anti-trust action for treble damages, because such an action was a suit for compensatory relief. *Chattanooga Foundry* v. *Atlanta,* 203 U.S. 390; see also *Baush Mach. Tool Co.* v. *Aluminum Co. of America,* 63 F. 2d 778, 780 (C.A. 2). These cases have been followed since the enactment of 28 U.S.C. 2462 in its present form. See *Greene* v. *Lam Amusement Co.,* 145 F. Supp. 346, 348 (N.D. Ga.); and *Florida Wholesale Drug* v. *Ronson Art Metal Works,* 110 F. Supp. 573 (D.N.J.), both rejecting the contention that 28 U.S.C. 2462 is applicable to suits for treble damages under the anti-trust laws.[17]

To the same effect, the provision in the Fair Labor Standards Act allowing employees to recover double damages resulting from an employer's failure to pay the minimum compensation provided by the Act has been held compensatory and not within the scope of 28 U.S.C. 2462. *Keen* v. *Mid-Continent Petroleum Corp.,* 58 F. Supp. 915 (N.D. Iowa), affirmed, 157

[16] Rev. Stat. § 1047 provided as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued * * *."

Section 1047 was originally enacted in 1839 (Act of February 28, 1839, c. 36, § 4, 5 Stat. 322) and remained unchanged until 1948 when it was codified in its present form as 28 U.S.C. 2462 (Act of June 25, 1948, c. 646, 62 Stat. 974). The only change made in the section involved phraseology only, and did not affect the substance. H. Rept. No. 308, 80th Cong., 1st Sess., p. A191.

[17] None of the cases which petitioners cite involves the application of 28 U.S.C. 2462.

F. 2d 310 (C.A. 8); see also *Overnight Motor Co.* v. *Missel,* 316 U.S. 572. Similarly, Section 2462 has been held inapplicable to an action by seamen for double wages under Rev. Stat. § 4529. *Buckley* v. *Oceanic S.S. Co.,* 5 F. 2d 545 (C.A. 9).

In addition, this Court has upheld, as compensatory, statutes providing for a fixed sum as damages (*Atchison T. & S.F. Ry.* v. *Nichols,* 264 U.S. 348) and for a minimum amount of damages (*Brady* v. *Daly,* 175 U.S. 148; and *Woolworth Co.* v. *Contemporary Arts,* 344 U.S. 228).

Petitioners find the sole bit of support for their position from an ambiguous fragment of legislative history of the Act of June 25, 1948, 62 Stat. 869, which enacted the revised Judicial Code in Title 28. By this Act, Section 2461(a) was added to Title 28. It provides that:

> (a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

According to the committee report, the subsection was intended "to clarify a serious ambiguity in existing law" resulting from the fact that "[n]umerous sections in the United States Code prescribe civil fines, penalties, and pecuniary forfeitures for violation of certain sections without specifying the mode of recovery or enforcement thereof." H. Rept. No. 308, 80th Cong., 1st Sess., p. A190. The committee report then lists several examples of such statutes, but does not list either the Surplus Property Act, the False Claims Act,

or any statute providing a comparable recovery. However it does state that a "civil fine, penalty, or pecuniary forfeiture is recoverable in a civil action" (*Ibid.*).

One of the cases cited in support of this proposition is *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537. Whether the drafter of this report misread the *Marcus* case and erroneously concluded that it dealt with a civil penalty, as petitioners contend, or whether on the other hand the writer of the report was referring to the language in the *Marcus* case which indicates the Court's view that a civil penalty can be sued for a civil action (317 U.S. at 550), this ambiguous bit of legislative history, at best, can give petitioners little comfort. The nature of the remedy under the False Claims Act was a tangential consideration in the report. To conclude from a citation in a committee report that an earlier Congress had enacted a civil penalty in the Surplus Property Act would be to distort the process by which lawyers and courts determine congressional intent. This fleeting reference to *Marcus* v. *Hess,* without even a statement of the facts or the statute involved, cannot legitimately be magnified into an expression of the 80th Congress' understanding that Section 26(b)(1) of the Surplus Property Act, passed by an earlier Congress, is penal. See *Fogarty* v. *United States,* 340 U.S. 8, 13–14.[18] In any event, whatever small support this reference to

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[18] In a recent case, *Rainwater* v. *United States,* 356 U.S. 590, this Court stated at page 593: "At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance."

Marcus v. *Hess* gives to petitioners' position, it is dwarfed by the conclusive indications outlined earlier in this brief that the Congress which passed the Surplus Property Act intended the remedy in Section 26(b)(1) to be compensatory.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 362.—October Term, 1958.

Raymond Jerean Koller and Martin Silverbrook, Petitioners, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[April 20, 1959.]

Per Curiam.

The judgment is affirmed. *Rex Trailer Co.* v. *United States*, 350 U. S. 148 (1956).

Mr. Justice Stewart, with whom Mr. Justice Douglas and Mr. Justice Whittaker join, dissenting.

I do not agree that disposition of this case is controlled by the decision in *Rex Trailer Co.* v. *United States*, 350 U. S. 148. Believing that § 26 (b)(1) of the Surplus Property Act of 1944, 40 U. S. C. § 489 (b)(1), imposes a civil penalty, and that an action thereunder is therefore subject to the five-year limitation provided in 28 U. S. C. § 2462, I would reverse. Cf. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537; *Erie Basin Metal Products, Inc.*, v. *United States*, 150 F. Supp. 561 (Ct. Cl.). *See Priebe & Sons* v. *United States*, 332 U. S. 407.